NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Hospital Menonita de Guayama, Inc. *and* Unidad Laboral de Enfermeras (OS) Y Empleadps de la Salud. Cases 12–CA–214830, 12–CA–214908, 12–CA–215039, 12–CA–215040, 12–CA–215665, 12–CA–217862, 12–CA–218260, and 12–CA–221108

June 28, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

The primary issue in this case is whether the Respondent, an admitted successor employer, unlawfully withdrew recognition seriatim from the incumbent Union representing five separate bargaining units before any negotiations had taken place. The judge found the withdrawals unlawful based on the successor bar doctrine as set forth in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and rejected the Respondent's evidence proffered to show that a majority of its employees no longer supported the Union. In conjunction with finding the withdrawals of recognition unlawful, the judge also found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union over collective-bargaining agreements for the five units, unilaterally changing its employees' terms and conditions of employment, and failing to respond to the Union's request for information relevant to its bargaining duties.[1]

We agree with the judge's findings[2] and conclusions, for the reasons he gave. We agree with the judge that,

[1] On May 30, 2019, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions with a supporting brief, and the Charging Party filed an answering brief, cross-exceptions, and supporting documents. The Respondent filed answering briefs to the General Counsel and Charging Party's cross-exceptions, and the Respondent filed separate reply briefs to the General Counsel's and the Charging Party's answering briefs, and the General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

We have amended the judge's conclusions of law to clarify that the Respondent's failure to bargain on the terms of initial collective-bargaining agreements began about February 7, 2018, as alleged in the complaint. We have amended the judge's remedy section to include the Board's standard remedies for unilateral change violations and the failure to furnish requested information, which the judge included in his recommended Order and notice provisions, but did not include in his remedy section.

We consider all submissions as amended. The Charging Party amended its initial submissions on October 3, 2019. We granted Acting General Counsel Peter Sung Ohr's motion for leave to withdraw certain of his predecessor's arguments regarding the validity of *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and declined to exercise jurisdiction over the Respondent's challenge to the Acting General Counsel's appointment. See *Hospital Menonita de Guayama, Inc.,* Case 12–CA–214830, et al. (May 5, 2021) (unpublished order). The Board has determined that such challenges to the authority of the Board's General Counsel based upon the President's removal of former General Counsel Peter Robb have no legal basis. See *Aakash, Inc., d/b/a Park Central Care and Rehabilitation Center*, 371 NLRB No. 46, slip op. at 1–2 (2021). In addition, the Fifth Circuit recently rejected a similar challenge to the President's removal of the former General Counsel. See *Exela Enterprise Solutions, Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022).

Further, on August 16, 2021, General Counsel Abruzzo issued a Notice of Ratification in this case approving the continued prosecution of the complaint, and, on December 2, 2021, she issued a second Notice of Ratification in this case that states as follows:

> On March 1, 2021, a motion was filed under the authority of former Acting General Counsel Peter Sung Ohr in this case pending on exceptions before the Board. The motion sought to withdraw portions of the General Counsel's answering brief to Respondent's exceptions and portions of the General Counsel's brief in support of cross-exceptions.
>
> Respondent alleged that such motion was an ultra vires act by former Acting General Counsel Ohr. Specifically, Respondent alleged that President Biden had unlawfully removed former General Counsel Peter B. Robb and unlawfully designated former Acting General Counsel Ohr.
>
> I was confirmed as General Counsel on July 21, 2021. My commission was signed and I was sworn in on July 22, 2021. On August 16, 2021, I ratified the filing of the motion in question.
>
> Former General Counsel Robb's term has indisputably now expired. In an abundance of caution, I was re-sworn in on November 29, 2021. Following appropriate review and consultation with my staff, I have again decided to ratify the filing of the motion in question. The motion correctly noted that the portions of the General Counsel's briefs recommending that the Board overturn existing law were unwarranted, and that overturning the existing Board law in question would not be consistent with the mission of the Act. My action does not reflect an agreement with Respondent's argument in this case or arguments in any other case challenging the validity of actions taken following the removal of former Acting General Counsel Robb. Rather, my decision is a practical response aimed at facilitating the timely resolution of the case.
>
> For the foregoing reasons, I hereby ratify the filing of the motion in question, the filing of the reply in support of that motion, and all actions taken in this case subsequent to the removal of former General Counsel Robb including by former Acting General Counsel Ohr and his subordinates.

Applying *Wilkes-Barre Hospital Company LLC, d/b/a Wilkes-Barre General Hospital*, 371 NLRB No. 55, slip op. at 1 fn. 2 (2022) (full-Board decision; collecting cases), we find that General Counsel Abruzzo's ratification renders the Respondent's argument moot.

[2] The judge's decision contains some apparently inadvertent or inconsistent statements which do not, however, affect the results herein. We have corrected those statements, as noted in the Background section below. In light of *NLRB v. Noel Canning*, 573 U.S. 513 (2014), we do

having applied *UGL-UNICCO*, supra, to find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union and the five bargaining units it represented, it is unnecessary to reach the General Counsel's alternative theory that unremedied unfair labor practices tainted any potential evidence of employees' loss of support for the Union, because finding a violation under that theory would be cumulative and would not affect the remedy. As discussed below, we rely on additional facts and reasoning in adopting the judge's finding that the Respondent failed to meet and bargain in good faith with the Union. Finally, we respond to our dissenting colleague's disagreement with *UGL-UNICCO*, and the balance it struck between employees' freedom of choice and the stabilizing effects of the successor bar with its mandated reasonable period for collective bargaining, which in this case never took place.

Background

As set forth in more detail in the judge's decision, the Respondent, Hospital Menonita de Guayama, Inc., purchased the assets of Hospital San Lucas Guayama (San Lucas) on September 12, 2017, and offered employment to all of San Lucas's employees in five bargaining units. At San Lucas, the Union had represented the registered nurses (RNs) and practical nurses (LPNs) since 1998, the medical technologists since 2005, and the technicians and the clerical workers since 2012. At the time of the acquisition, the Union was in the process of negotiating collective-bargaining agreements for all five units: initial agreements for the technicians and the clerical workers, and renewal agreements for the three older units. The Respondent informed employees that it would not honor any of San Lucas's collective-bargaining agreements, but would bargain terms anew.[3] All employees accepted the Respondent's offers of employment (under new terms and conditions of employment going into effect on September 13, 2017), and operations continued otherwise unchanged. On September 13, the Union requested recognition from the Respondent as well as information concerning the employees who were offered employment.

On September 19–20, Hurricane Maria hit Puerto Rico, disrupting power and telecommunications.[4] The Respondent assigned the RNs to work 12-hour schedules instead of their usual 8-hour shifts. On October 21, however, the Respondent restored the 8-hour shifts after the parties' informal discussions yielded no agreement on the permanent implementation of the shift change.[5]

The Respondent recognized the Union by letter of November 6, and, as stated in its prior communications, provided documents in response to the Union's September 13 request.[6] On November 22 at a Thanksgiving luncheon, the Respondent's hospital administrator and human resources director distributed certificates and $150 checks to the employees in the five units who had worked overnight during the hurricane.[7] Despite having officially recognized the Union at this point, the Respondent neither gave the Union advance notification, nor offered to bargain concerning the hurricane bonuses.

Between February and April 2018, the Respondent withdrew recognition seriatim from each of the five bargaining units, claiming that the Union had ceased to represent the employees in the affected units based on objective evidence that they no longer wished to be represented by the Union. After each withdrawal of recognition, the Respondent made unilateral changes to the terms and conditions of employment of the newly-unrepresented employees. On February 5, the Respondent withdrew recognition from the technicians unit; 6 days later it granted the technicians a wage increase. On February 7, the Union requested dates to meet and bargain the various collective-

not rely on the recess-Board decision cited by the judge, *Postal Service,* 359 NLRB 56 (2012).

[3] There were no exceptions to the judge's conclusions that the Respondent did not violate the Act by setting initial terms and conditions of employment for unit employees without giving the Union notice or an opportunity to bargain.

[4] Since September 18, the Respondent had made several failed attempts to deliver a response to the Union's September 13 request for recognition and information, which it finally hand-delivered on October 13, stating that "Once we finalize the process of determining whether a majority of employees who previously worked for Hospital Episcopal San Lucas Guayama accepted the offer of employment of Hospital Menonita Guayama, then we will proceed according to law, regarding the recognition of the Union. If the Union is recognized, then we will proceed to comply with your request."

[5] There were no exceptions to the judge's conclusion that the Respondent's September–October 2017 shift change for its registered nurses occurred outside the Sec. 10(b) period and could not form the basis of an unfair labor practice.

[6] The General Counsel excepts to the judge's failure to consider how the Respondent's delay in recognizing the Union "shed light" on the circumstances surrounding its withdrawals of recognition, while the Respondent excepts to the judge's statement that the Respondent's 2017 change to the registered nurses' shift could be used to "shed[] light 'on the true character of matters occurring within the limitations period.'" We find it unnecessary to rely on the judge's determination to use or not use certain facts to "shed light" on later events, as neither instance would materially affect the analysis. Member Wilcox agrees but emphasizes that there was nothing improper about the judge considering the Respondent's actions as background evidence of misconduct. See, e.g., *Fruehauf Trailer Services*, 335 NLRB 393, 393 fn. 5 (2001).

[7] We correct the inadvertent inconsistencies in the judge's decision to reflect that the Respondent recognized the Union on November 6, 2017, and that only one of the alleged unilateral changes—the granting of a bonus for employees who worked during Hurricane Maria—was made when the Respondent still recognized the Union for the units involved. We have also corrected the inadvertent errors in the judge's decision and recommended Order as set forth in the General Counsel's unopposed exceptions Nos. 2, 5, 6, and 8.

bargaining agreements. By letter that day the Respondent requested that the Union send bargaining proposals for each of the five units before it would schedule negotiation meetings. The Union sent five bargaining proposals on February 12. On February 14, the Respondent withdrew recognition from the clerical workers, and by separate letter, confirmed that it received the Union's proposals, but stated that bargaining could only begin after it submitted its counterproposals by the third week in April. Two days later, it withdrew recognition from the medical technologists.

In March 2018, the Union learned that the Respondent was planning to hold an orientation meeting to explain the Menonita Health Plan to employees and requested bargaining over the selection of an insurance carrier. The Respondent answered that it had not made any changes to the medical benefits provided to the RNs and LPNs, the remaining two units that the Union represented. On March 14, the date of the meeting, the Union requested documents that the employees had signed at the meeting including the document to renew their medical insurance, as well as copies of the attendance sheet for the meeting. The Respondent eventually provided the attendance sheet, but never replied to the Union's second request on April 4, for the documents signed by employees.

Between April 1 and June 1, 2018, the Respondent eliminated the requirement that employees pay a portion of their health insurance premiums for those units from which it had withdrawn recognition. Represented employees paid 50 percent of their premium; after recognition was withdrawn, they paid nothing. On April 6, the Respondent withdrew recognition from the RNs and on June 17, increased the RNs' shift schedule from 8 to 12 hours. On April 18, the Respondent emailed the Union its proposal for the final unit it still recognized – the LPNs, but soon after withdrew recognition from that unit on April 24, without engaging in any bargaining on its own proposal. On May 18, the Respondent for the first time granted its RNs and LPNs a uniforms bonus of $200. Finally, in late June or early July, after it had withdrawn recognition from all five units, without notifying or bargaining with the Union, the Respondent distributed an employee manual and general rules of conduct which had not existed before, and which changed disciplinary rules and benefits for employees in all five units.

I.

As described above, after the Respondent withdrew recognition from the technicians unit, the Union repeated its request for bargaining on February 7, 2018.[8]

We agree with the judge's finding that the Respondent failed and refused to meet and bargain in good faith with the Union on the terms of initial collective-bargaining agreements. We further find that the Respondent has not excepted to the merits of the judge's conclusion that it failed and refused to meet and bargain with the Union since on or around February 7, 2018. The Respondent does except to the judge's statement that its "unlawful withdrawals of recognition give rise to a strong suspicion that [it] had no intention of engaging in meaningful bargaining," and to the judge's recommended special bargaining remedies, which we discuss in the amended remedy section below. But those exceptions are insufficient to challenge the merits of the failure to bargain violation. Accordingly, under the Board's Rules and Regulations, the Respondent has waived its opportunity to do so.[9]

Even if the Respondent had not waived all arguments on the merits, however, we would still adopt the judge's conclusion that the Respondent did not discharge its Section 8(d) duty to bargain, which was separate from the Union's duty, by conditioning an in-person meeting upon the submission of written proposals and then further delaying bargaining for over 2 months without explanation after the Union had submitted proposals for all five units.[10] We would also reject the Respondent's effort to attribute its failure to bargain to the Union. As admitted by the Respondent, the Union had been asking to bargain since mid-October 2017 and was not required to repeat its request.[11]

II.

The Respondent excepts to the judge's reliance on the successor bar doctrine to reject its evidence of employees' loss of majority support for the Union, and requests that the Board overrule *UGL-UNICCO*, supra, and replace it with the standard in *MV Transportation,* 337 NLRB 770 (2002), in which an incumbent union's presumption of continued majority support under a successor employer was rebuttable. It argues that *UGL-UNICCO* enlarged its Section 8(a)(5) duty to bargain, contrary to Supreme Court precedent, and failed to achieve the proper balance between employees' right to refrain from representation and

[8] Although the judge did not make findings as to every communication between the parties, the record reflects, and the Respondent admits, that the Union requested bargaining by text as early as October 12, 2017. We focus on the period alleged in the complaint, that the Respondent's failure to bargain began on February 7, 2018.

[9] See Board's Rules Secs. 102.46(a)(1)(ii) and (f); 102.48.

[10] See *Gene's Bus Co.,* 357 NLRB 1009, 1012 (2011); *Quality Roofing Supply Co.,* 357 NLRB 789, 789 (2011).

[11] See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 52–53 (1987); *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 616 (1990).

Member Wilcox agrees that the Respondent did not meet its duty to bargain but finds it unnecessary to pass on whether the Respondent adequately excepted to the judge's finding.

the goal of the Act to promote labor relations stability. Our dissenting colleague agrees with this perspective, and instead of finding the Respondent's withdrawal of recognition unlawful, he would remand the relevant allegations to the judge to determine whether untainted evidence established that the Union had lost its majority support. His elaboration on the Respondent's arguments, however, only restates contentions carefully considered and rejected by the *UGL-UNICCO* Board (as well as the only circuit court to review its reasoning). As we explain below, the balancing of interests that are in tension with each other must be done in the service of promoting collective bargaining.

The explicit policy of the National Labor Relations Act is to *promote* collective bargaining.[12] In *UGL-UNICCO*, the Board explained the successor bar and the rationale for bar doctrines generally:

> Under [the successor bar] doctrine, when a successor employer acts in accordance with its legal obligation to recognize an incumbent representative of its employees, the previously chosen representative is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status . . . . [A]nalogous "bar" doctrines are well established in labor law, based on the principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB,* 321 U.S. 702, 705 (1944). These bar doctrines . . . promote a primary goal of the National Labor Relations Act by stabilizing labor-management relationships and so promoting collective bargaining, without interfering with the freedom of employees to periodically select a new representative or reject representation.[13]

The successor bar, then, is designed to promote collective bargaining when a new employer, the successor, takes over a workplace where employees are already represented by a union. As it did in this case, the new employer typically is free to decide—without the union's participation—which of the predecessor's employees to hire and how to change employees' wages, benefits, and working conditions. In such situations, the incumbent union is in an especially vulnerable position, through no fault of its own. Accordingly, the Board has held, with the Supreme Court's approval, that the policies of the Act are best served by presuming that the union has continuing majority support from employees and by requiring the successor employer to recognize and bargain with the union.[14] The successor bar is an extension of this principle, as the *UGL-UNICCO* Board explained.[15] The new collective-bargaining relationship between the union and the successor employer "must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed"[16] before the union's representative status can be challenged by the employer or employees.[17] *UGL-UNICCO* addressed the effect of a successor bar on the statutory right of employees to freely choose (or reject) a union, acknowledging that "employee freedom of choice is . . . a bedrock principle of the statute."[18] Because the insulated period created by the successor bar extended only for a reasonable period of bargaining, with an outer limit of 1 year (and a minimum of 6 months), the Board concluded that the bar did not unduly burden employee free choice.[19]

The decision in *UGL-UNICCO* was reached after the Board had issued a notice and invitation to file briefs to the public, as well as to the parties.[20] And while the Board reversed the precedent that our colleague prefers,[21] it comprehensively explained why. The *UGL-UNICCO* Board carefully traced the Board's doctrinal twists and turns in

[12] Sec. 1 of the Act declares that the "policy of the United States" is to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of . . . designation of representatives of their own choosing." 29 U.S.C. § 151.

[13] 357 NLRB at 801 (footnotes and citations omitted).

[14] See *Fall River*, supra, 482 U.S. at 38-40.

[15] 357 NLRB at 806–808.

[16] *Franks Bros. Co.*, supra, 321 U.S. at 705. The collective-bargaining relationship in this case quite clearly had no "fair chance to succeed" under any reasonable understanding of that principle. Although the Respondent had recognized the Union in November 2017 and was aware of the Union's request to bargain, it withdrew recognition from the technicians unit and promptly granted those employees wage increases without notifying and bargaining with the Union. After the Union reiterated its request on February 7, 2018, asking for specific dates to meet and negotiate collective-bargaining agreements, the Respondent proceeded to withdraw recognition from the remaining units, making unilateral changes to the terms and conditions of employment of each newly-unrepresented unit, blatantly weakening any perception of effectiveness that the Union might have possessed until that point. Within 6 days of finally producing a proposal relating to the final remaining represented unit – the LPNs – the Respondent withdrew recognition without even attempting to meet and bargain over its own proposal.

[17] "An insulated period for the union clearly promotes collective bargaining. It enables the union to focus on bargaining, as opposed to shoring up its support among employees, and to bargain without being 'under exigent pressure to produce hothouse results or be turned out,' pressure that can precipitate a labor dispute and surely does not make reaching agreement easier. An insulated period also increases the incentives for successor employers to bargain toward an agreement." *UGL-UNICCO*, supra, 357 NLRB at 807, quoting *Brooks v. NLRB,* 348 U.S. 96, 100 (1954).

[18] *UGL-UNICCO*, supra, 357 NLRB at 808 (citing *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999)).

[19] *UGL-UNICCO*, supra, 357 NLRB at 808–809.

[20] Id. at 801-802.

[21] *MV Transportation*, 337 NLRB 770 (2002), which itself had overruled *St. Elizabeth Manor*, supra.

this area over decades and showed why revisiting the successor-bar issue was appropriate, given developments in the American economy that had made successorship situations much more common.[22] The Board also persuasively explained why reinstating the successor bar doctrine was the better policy choice, demonstrating the flawed reasoning of earlier Board decisions.[23]

In attacking the successor bar, our dissenting colleague does not make any new arguments. He sets forth a detailed evolution of the doctrine, but adopts the flawed reasoning from *MV Transportation* and its antecedents, and cites with approval arguments from Member Hayes' dissenting opinion in *UGL-UNICCO*, all of which the Board fully considered and rejected.[24] And while leaning heavily on a 1983 Sixth Circuit decision[25]—issued before the current successor bar was adopted or explained by the Board – he accords little weight to the most relevant and recent circuit court reasoning on the subject.

In the decade since *UGL-UNICCO* issued, the only federal appellate court to consider its reestablished successor bar doctrine, the First Circuit, upheld it without difficulty, seeing "no cause to doubt that the Board's position . . . is within the scope of reasoned interpretation and thus subject to judicial deference . . . ."[26] Writing for the court, Associate Justice David Souter described the Board's decision as an "adequately explained interpretive change reflecting the Board's judgment of a reasonable balance between the Section 7 right of employee choice and the need for some period of stability to give the new relationships a chance to settle down."[27] "The need to strike such a balance is not itself challenged, and hardly could be," he observed.[28]

There can be no suggestion here that because the rebuttable presumption of majority status was in place longer than the successor bar was before the Board decided *UGL-UNICCO*, it is the superior rule. The former rule came into being in a different era well before our country's annual volume of mergers and acquisitions had reached $822 billion in 2010.[29] In deferring to the Board's balancing of competing interests in *UGL-UNICCO*, the First Circuit favorably observed that the Board "brought up to date the commercial reality ignored by the *MV Transportation* majority[.]"[30] The First Circuit also recognized that the greater the number of mergers and acquisitions, the greater the likely incidence of successor situations with unionized employees, leading to greater volatility in union-management relationships across the national labor market, which in turn would result in more litigation challenging union support during the unsettled period with the new employer. It warned that "[t]his risk would not only affect the actual employment relations in the market overall owing to the quantity of successorships, but by the same token would also portend a heavier burden on the . . . Board itself, in administering the National Labor Relations Act."[31]

The annual volume of mergers and acquisitions in the U.S. continues to expand. Indeed, from the time of the *UGL-UNICCO* decision to the present, the annual volume of mergers and acquisitions has increased from $822 billion in 2010 to somewhere in the vicinity of $2.6 trillion in 2021.[32] Accordingly, since the economic drivers leading to an increased likelihood of successorship situations continue their expansion, it is no less urgent for Board doctrine such as a successor bar to facilitate smooth transitions from one employer to another, which "would serve stability in labor relations better in a market likely to be fraught with higher numbers of upsets than in the world of forty years ago."[33] We believe, then, that the *UGL-UNICCO* Board was justified in revisiting the successor-

[22] 357 NLRB at 803-806.

[23] Id. at 806-808.

[24] Id. at 810.

[25] *Landmark lnternational Trucks v. NLRB,* 699 F.2d 815, 818 (6th Cir. 1983).

[26] *NLRB v. Lily Transportation Corp.*, 853 F.3d 31, 38 (1st Cir. 2017).

[27] Id. (Associate Justice Souter was sitting by designation.) The First Circuit also rejected the argument that our dissenting colleague makes here, that *UGL-UNICCO* is contrary to *Fall River*, supra, and *NLRB v. Burns Int'l Security Services, Inc*., 406 U.S. 272 (1972). Although both cases refer to the rebuttable presumption, the First Circuit found that the Supreme Court's language in those cases "simply describes the legal landscape at the time," and that "[n]either case holds that a rebuttable presumption, rather than a bar, is required in a successorship situation." *NLRB v. Lily Transp.,* 853 F.3d at 38–39. These same arguments were made by dissenting Member Hayes in *UGL-UNICCO* and rejected by the Board for the same reason, as well as on more technical grounds. Thus the *UGL-UNICCO* Board quoted the Court's own explanation that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.'" *UGL-UNICCO,* 357 NLRB at 806 fn. 22, quoting *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Servs.,* 545 U.S. 967, 982 (2005); see also *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863–864 (1984). It is clear that the Act does not unambiguously address the existence or contours of a successor bar, or what type of presumption should apply in a successorship situation. Therefore even if the language relied on by our colleague in *Fall River* could be described as a holding of the Supreme Court, it would not prevent the Board from adjusting the delicate balance of competing rights against the changing patterns of industrial life in the successor arena.

[28] *NLRB v. Lily Transp. Corp.*, 853 F.3d at 38.

[29] *UGL-UNICCO*, supra at 805 fn. 17.

[30] *NLRB v. Lily Transp. Corp.*, 853 F.3d at 38.

[31] Id. at 37.

[32] See Matthew Toole, *Dealmakers Ring Out 2021 as the Year of M&A ,* Refinitiv (Jan. 12, 2022), https://www.refinitiv.com/perspectives/market-insights/dealmakers-ring-out-2021-as-the-year-of-ma/ (last visited June 3, 2022).

[33] *NLRB v. Lily Transp. Corp.*, 853 F.3d at 37.

bar issue in light of economic developments, even if the soundness of the Board's policy choice there does not depend on those developments, and that no economic changes since *UGL-UNICCO* suggest that it is now time to take another look. In any case, we reject our dissenting colleague's legal and policy arguments, including his characterization of our reasons for adhering to *UGL-UNICCO.*

Our colleague's criticism of the successor bar as a "prohibition on the exercise of employee free choice," distinct from the established bars that protect certification, voluntary recognition,[34] and collective-bargaining agreements, fails to keep in sight the Act's overarching goal of promoting collective bargaining. Indeed, as noted above, each of these doctrines are based on the principle that rightfully established bargaining relationships "must be permitted to exist and function for a reasonable period in which [they] can be given a fair chance to succeed."[35] While our colleague repeats the characterization in *MV Transportation* of the bar as relying "on a paternalistic assumption that the employees in a successor employer situation need the protection of an insulated period . . . to make an informed decision regarding the effectiveness of their bargaining representative,"[36] the First Circuit addressed such concerns by finding that "some limited discouragement of an unduly hasty reexamination of a prior Section 7 choice serves to provide time for second thoughts, a subject the statute does not directly address in successor cases, but which falls within its 'underlying purpose,'" approving the Board's justification for rejecting the rebuttable presumption in *UGL-UNICCO.*[37]

Our colleague's concern that successive bar periods restrict employee free choice is also a well-worn argument set forth by the majority in *MV Transportation.* But that too is incongruent with the Act's goal of promoting collective bargaining because it adds the contract bar of the *predecessor* employer who has successfully fulfilled that goal, to the bar periods that could potentially apply to the successor employer (but only if it successfully reaches a collective-bargaining agreement), to conclude that the total period affected by bars excessively restricts employees' right to challenge an incumbent union. The Board addressed this concern by shortening the potential contract bar applicable to a successor employer from 3 to 2 years, where there was no open period during the final year of the predecessor's bargaining relationship with the union.[38]

Our colleague further objects to the practical effect of the length of a bar period that does not commence until the first bargaining session. But this built-in incentive for the parties to begin bargaining sooner rather than later is hardly outside the employer's control. As can be seen by the facts here, if the Respondent had been ready to negotiate immediately after recognizing the Union on November 6, the bar period could have begun and ended in short order. By starting the clock at the parties' first bargaining session, the rule buffers the bargaining relationship from an employer's potential exploitation of unexpected delays and unforeseen disasters—such as hurricanes—to erode the waning support that employees in an uncertain situation are likely to give their union.[39]

The facts in this case clearly demonstrate the need to protect the collective-bargaining process during the

[34] While our colleague asserts that employees have greater scope to exercise Sec. 7 rights following a grant of voluntary recognition than they do in a successorship situation, this is only because the recently enacted Election Protection Rule (2020) provides for a notice period of 45 days during which the employees may petition for an election. See Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18366, 18380–18388 (April 1, 2020; effective July 31, 2020); Board's Rules and Regulations, Sec. 103.21. This recent rule, to which then-Member McFerran dissented at the NPRM stage, aligns with our colleague's views on employees' right to choose not to be represented, but it does not obviate the need for a successor bar. See 84 Fed. Reg. 39930, 39939–39940, 39949–39951 (Aug. 12, 2019). (Chairman McFerran was not a member of the Board when the prior majority codified the proposal in a final rule, and Member Wilcox was not a member of the Board when the rule was proposed or finalized.)

[35] *UGL-UNICCO*, supra at 801, quoting *Franks Bros. Co.*, supra, 321 U.S. at 705.

[36] *MV Transportation,* 337 NLRB at 773 fn. 12.

[37] 853 F.3d at 35-36, citing *Brooks v. NLRB*, supra.

[38] *UGL-UNICCO*, supra at 810. See also *NLRB v. Lily Transp.*, supra, 853 F.3d at 37–38 (noting the Board's temporal modification of the successor bar as part of its "adequately explained interpretive change").

Our colleague's related concern that *UGL-UNICCO* creates too much uncertainty by providing a flexible bar duration ranging from a minimum of 6 months to no more than a year (where the successor changes its employees' baseline terms and conditions of employment) merely restates the age-old tradeoff between flexible legal standards and bright line rules. That he would strike the balance differently does nothing to suggest that *UGL-UNICCO*'s standard is infirm. In any event, the limits set provide a degree of certainty, while reflecting that a reasonable period for bargaining is necessarily a factual determination that will vary from bargaining relationship to bargaining relationship, drawing on another legal standard that has met with judicial approval. See *UGL-UNICCO*, supra at 808–809, citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).

[39] We are unpersuaded by our colleague's suggestion that we should build a rule around the unlikely hypothetical that a union might, through delaying the onset of bargaining, attempt to extend the successor bar period to regain their unit's support. Unions are well aware that their efficacy is best advertised through successfully reaching a collective-bargaining agreement. Indeed, the much more common scenario in Board precedent is of successor employers, like this one, refusing to bargain altogether with their employees' chosen representative. In any event, the Board is fully capable of crafting exceptions to the application of its bar doctrines in the anomalous circumstances of unreasonable union delay. See, e.g., *Virginia Mason Medical Center,* 350 NLRB 923, 923–924 (2007).

disruptive transition between employers. When the Respondent acquired Hospital San Lucas in 2017, all five units were in the process of negotiating collective-bargaining agreements. The three units negotiating successor agreements had been represented by the Union since 1998 (RNs and LPNs) and 2005 (technologists). The two units negotiating a first agreement (technicians and clerical workers) had been represented since 2012. The relationship between the Union and Hospital San Lucas was replaced by a new relationship with the Respondent, who lawfully changed the existing terms and conditions of employment while determining over a period of almost 2 months whether a sufficient number of employees had accepted its offers of employment to entitle the Union to recognition. Soon, the employees may have lost confidence in the Union's ability to protect their interests when it was unable to schedule its first bargaining session or obtain documents relevant to negotiations. Instead of bargaining, the Respondent granted bonuses without notifying the Union, withdrew recognition from the five units, granted increased benefits to the newly-unrepresented units, and issued new employee rules of conduct. Without a temporary bar period, there would be little hope that the parties' collective-bargaining relationship could have a chance of succeeding.

Given this period of uncertainty, our colleague is mistaken when he asserts that affirming majority status through a decertification election would have no disruptive effect on collective bargaining. Quick access to a decertification election goes far beyond a successor employer's right to set initial terms and conditions of employment, long established in Board successorship doctrine. Moreover, allowing decertification petitions to proceed to elections during the period of initial bargaining between an incumbent union and a new successor employer would distract the parties from focusing on negotiations and require diversion of their available resources, giving the new relationship little chance to succeed. Most pointedly though, if we follow our colleague's claim (repeated from former Member Hayes) to its logical conclusion—that it is a decertification election itself, and not a temporary bar, that contributes to labor relations stability—then there is no justification for *any* of the bar periods established under Board law. It is one thing to express disagreement with how to strike the appropriate balance between labor relations stability and employee free choice. It is quite another to essentially deny that any need for balancing exists.[40]

The facts in this case make crystal clear why the protection of a successor bar is needed and appropriately balances the successor employer's and the employees' interests. There is simply no reason to revisit sound Board doctrine in this case. It is working, as Congress intended, to promote stable and effective collective bargaining relationships.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3(b):

"(b) Failed and refused to meet and bargain in good faith with the Union since about February 7, 2018, on the terms of initial collective-bargaining agreements."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain steps to effectuate the policies of the Act. In addition to the remedies set forth by the judge, and having adopted the judge's findings that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, failing and refusing to bargain with the Union for initial collective-bargaining agreements, and unilaterally changing employees' terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain, we shall order the Respondent to (1) recognize and, on request, bargain in good faith with the Union as set forth in the judge's remedy section; (2) on request by the Union, rescind the following changes in unit employees' terms and conditions of employment and restore the previously existing terms and conditions of employment: changing the shifts of registered nurses; increasing the wages of technicians; granting employees a Hurricane Maria bonus or incentive; eliminating the requirement that employees pay a portion of their health insurance premiums; granting a uniforms bonus to registered nurses and practical nurses; and distributing and implementing an employee manual and general rules of conduct that changed unit employees' terms and conditions of employment.[41]

---

[40] Indeed, if we were to embrace the argument that decertification elections should be accorded weight on both the employee free choice *and* the stability side of the scale because (according to our colleague) their results "either affirm[] the majority upon which stability must be based, or reveal[] that there is no real relationship to be stabilized," then one would be drawn to reconsider the wisdom behind any of the Board's bar doctrines foreclosing such elections, no matter how venerable their age. The First Circuit had no trouble describing the balancing involved with greater accuracy. See *NLRB v. Lily Transp.*, supra, 853 F.3d at 38 (describing *UGL-UNICCO*'s successor bar as "a reasonable balance between the Section 7 right of employee choice and the need for some period of stability to give the new relationships a chance to settle down"). We reject our colleague's reasoning which focuses on the known relationship between the Union and its members instead of the unknown *bargaining* relationship between the Union and the new employer that the 6–12 month bar period seeks to protect. Instead, we stand behind the need to give bargaining relationships a reasonable chance to succeed as reflected by the Board applying various bar doctrines for decades.

[41] To the extent that the unlawful unilateral changes have improved the terms and conditions of unit employees, the Order set forth below

Having further adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested information that is relevant and necessary to performing its functions as the collective-bargaining representative of its unit employees, we shall order the Respondent to furnish to the Union in a timely manner the information it requested on March 14, 2018, concerning documents employees signed at a March 14, 2018 meeting on health insurance benefits.

The judge included an affirmative bargaining provision in his recommended Order to remedy the Respondent's unlawful withdrawal of recognition. For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we agree that this remedy is warranted. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68. The Respondent does not argue that the judge's recommended affirmative bargaining order is improper if the Board affirms the judge's 8(a)(5) finding. We thus find it unnecessary to provide a specific justification for that remedy. See *Sunbelt Rentals, Inc.,* 370 NLRB No. 102, slip op. at 5 fn. 18 (2021) (and cited cases); see also *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (in the absence of particular exceptions, the Board may issue an affirmative bargaining order without specifically stating the basis for the order).

We reject the Respondent's argument that the judge's recommended special remedies of a bargaining schedule and reporting requirements are not warranted because its conduct was not sufficiently egregious and occurred only after it withdrew recognition in response to employees' desire not to be represented. We agree with the judge that the recommended bargaining remedies are appropriate for the reasons stated by the judge, and note that, in these circumstances, would function effectively together to ensure compliance.

We deny the Charging Party's exception to the judge's failure to recommend a back pay remedy that includes a uniform allowance. The Charging Party provided no evidence of a past practice that a successor employer setting initial terms and conditions of employment would have been required to continue. We also deny the Charging Party's request for a bargaining order of 1 year in duration. *UGL-UNICCO,* supra, provides for a reasonable period of bargaining (a minimum of 6 months to a maximum of 1 year) measured from the date of the first bargaining session, and the determination whether a reasonable time has passed "cannot be made prospectively, but can only be made after an examination of the bargaining history." *Exxel-Atmos, Inc.,* 323 NLRB 888, 889 (1997), enfd. in relevant part 147 F.3d 972 (D.C. Cir. 1998).

We shall modify the judge's recommended Order to provide for the posting of the notice in accordance with our recent decision in *Paragon Systems, Inc.,* 371 NLRB No. 104 (2022), and in accord with *J. Picini Flooring*, 356 NLRB 11 (2010), and to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Hospital Menonita de Guayama, Inc., Guayama, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union) or failing or refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the five bargaining units.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union in good faith as the exclusive collective-bargaining representative of the employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All medical technologists; excluding all other employees, executives, administrators, supervisors, head nurses, nurses in charge of training, and all other individuals with the authority to employ, discharge, promote, discipline or who in any way can change the status of an employee, or make recommendations, the infirmary director and the infirmary director's assistants.

shall not be construed as requiring or authorizing the Respondent to rescind such improvements unless requested to do so by the Union.

All registered nurses; excluding all other employees, executives, administrators, supervisors, head nurses, nurses in charge of trainings, and all other individuals with the authority to employ, discharge, promote, discipline or who in any way can change the status of an employee, or make recommendations, the infirmary director and the infirmary director's assistants.

All practical nurses; excluding all other employees, executives, administrators, supervisors, head nurses, nurses in charge of trainings, and all other individuals with the authority to employ, discharge, promote, discipline or who in any way can change the status of an employee, or make recommendations, the infirmary director and the infirmary director's assistants.

All full-time Surgery Room Technicians, CT Technicians, Physical Therapy Technicians and X Ray Technicians employed by Respondent; excluding all other employees, Child and Adult Food Coordinators, X Ray Coordinators, Operation Room Coordinators, CT Coordinators, confidential employees, guards and supervisors as defined in the Act.

All full-time office clerks at its facility in Guayama, Puerto Rico; excluding all other employees, secretaries, guards and supervisors, as defined in the Act.

Such bargaining sessions shall be held for a minimum of 15 hours a week, and the Respondent shall submit written bargaining progress reports every 30 days to the compliance officer of Region 12, serving copies thereof on the Union.

(b) On request by the Union, rescind the following changes in the terms and conditions of employment for its unit employees that it made without affording the Union notice and an opportunity to bargain: changing the shifts of registered nurses; increasing the wages of technicians; granting employees a Hurricane Maria bonus or incentive; eliminating the requirement that employees pay a portion of their health insurance premiums; granting a uniforms bonus to registered nurses and practical nurses; and distributing and implementing an employee manual and general rules of conduct that made changes in unit employees' terms and conditions of employment.

(c) Furnish to the Union in a timely manner the information requested by the Union on March 14, 2018, concerning a March 14, 2018 meeting the Respondent held with employees on health insurance benefits.

(d) Post at its facility in Guayama, Puerto Rico, copies of the attached notice marked "Appendix,"[42] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 22, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2022

_____
Lauren McFerran, Chairman

_____
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[42] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER RING, dissenting in part.

A successor employer to a unionized predecessor under the standards established by the Supreme Court in *Burns* and *Fall River Dyeing*[1] must recognize and bargain with the incumbent union. In other words, unions representing employees of a successor employer are presumed to enjoy the support of a majority of the employees they represent. Whether that presumption should be deemed rebuttable or, for a period of time, irrebuttable—i.e., conclusive—has been a point of contention, and Board law has oscillated on this issue. Currently, under *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), the presumption is deemed conclusive for no less than 6 months and no more than 1 year from the date the successor and incumbent union first meet to bargain. Id. at 808-809. During that time, it is per se unlawful for the successor to withdraw recognition from the union, no matter how clear the evidence that the union no longer has the support of a majority of employees in the bargaining unit. Indeed, even a Board-run, secret-ballot election—"the preferred . . . method of ascertaining whether a union has majority support"[2]—is forbidden. Adopting a term first used in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), the *UGL-UNICCO* Board called this prohibition on the exercise of employee free choice the "successor bar."

Applying *UGL-UNICCO*, the judge found that the Respondent's withdrawal of recognition from the Union in each of five bargaining units[3] was unlawful, and he excluded from the record documentary evidence the Respondent believes will show that the Union had lost majority support in each of those units. My colleagues adopt the judge's application of *UGL-UNICCO* and his finding that the withdrawals of recognition were unlawful. Because I believe that the successor-bar doctrine is contrary to Supreme Court precedent and imposes an unwarranted restriction on employees' Section 7 rights, I would overrule *UGL-UNICCO* and hold that the incumbent union in successorship situations enjoys a rebuttable presumption of majority status only. Accordingly, I would remand the allegations that the Respondent unlawfully withdrew recognition from the Union for the judge to determine whether the withdrawals were supported by untainted evidence that 50 percent or more of employees in each unit no longer wished to be represented by the Union.[4]

I. LEGAL BACKGROUND

As early as 1970, the Board took for granted that in a successorship situation, the successor steps into its predecessor's shoes. Thus if, when the business changed hands, the incumbent union was entitled to a continuing but rebuttable presumption of majority status, this remained the case after the successor took over. See *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962, 964 (1970) ("[A]t the time of the [r]espondent's purchase of the Plaza there was operative a valid presumption of continuing majority . . . . This presumption would not have stopped the [r]espondent . . . from questioning the [u]nion's continuing majority status *as of that time*.") (emphasis added).

[1] An entity is a legal successor under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), where there is both operational continuity and workforce continuity. That is, if the acquiring entity continues the predecessor's operations without substantial change and hires, as a majority of its workforce, union-represented employees of the predecessor, then it is a legal successor to its predecessor and has a duty to recognize and bargain with the incumbent union. However, the successor typically has the right to set initial employment terms unilaterally.

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

[3] The bargaining units are designated by letter: Unit A (medical technologists), Unit B (LPNs), Unit C (RNs), Unit D (technicians), and Unit E (clerical workers).

[4] Sec. 9(a) of the Act makes a labor organization the exclusive representative of employees in an appropriate bargaining unit if it is designated or selected as such by a majority of the unit. Thus, to retain its right under Sec. 9(a) to represent a bargaining unit, a union must be supported by more than 50 percent of the unit employees.

Because they turn on whether the withdrawals of recognition in Units A, D, and E were lawful, I would also remand the allegations that, after those withdrawals, the Respondent violated Sec. 8(a)(5) by making unilateral changes to employment terms and conditions of employees in those units and by failing to provide the Union requested information pertinent to those units.

I agree with my colleagues that, before it withdrew recognition, the Respondent violated Sec. 8(a)(5) and (1) of the Act by (1) failing to bargain in good faith with the Union by insisting on written proposals before it would agree to meet and by delaying in providing counterproposals; (2) paying $150 bonuses to employees who worked the night Hurricane Maria struck Puerto Rico, without first providing the Union notice and opportunity to bargain; and (3) failing to provide the Union with relevant requested information concerning Units B and C. Regarding the first of these three unfair labor practices, I join Chairman McFerran in finding the violation both on the merits and based on the Respondent's failure adequately to except.

My colleagues reject the Respondent's argument regarding the President's removal of former General Counsel Peter Robb, relying on *Aakash, Inc., d/b/a Park Central Care & Rehabilitation Center*, 371 NLRB No. 46 (2021). Additionally, they find the argument mooted by General Counsel Abruzzo's December 2, 2021 notice of ratification. I acknowledge and apply *Aakash* as Board precedent, although, as noted in that decision, I disagree with the Board's approach and would have adhered to the position that "reviewing the actions of the President is ultimately a task for the federal courts," as the Board concluded in *National Assoc. of Broadcast Employees and Technicians—The Broadcasting and Cable Television Workers Sector of the CWA, AFL-CIO, Local 51*, 370 NLRB No. 114, slip op. at 2 (2021) (*NABET*). See *Aakash*, 371 NLRB No. 46, slip op. at 4-5; see also *Exela Enterprise Solutions, Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022) (reaching the same conclusion the Board reached in *Aakash* regarding the President's removal of Robb, but based on de novo review and according the Board's decision no deference). I also acknowledge the General Counsel's notice of ratification, but for the same reasons I stated in *Aakash* and *NABET*, I express no view as to its legal effect.

Following the Supreme Court's 1972 decision in *Burns*, supra, the Board directly addressed the issue of whether an incumbent union, in a successorship situation, enjoys a conclusive or rebuttable presumption of majority status in *Southern Moldings, Inc.*, 219 NLRB 119 (1975). The issue in *Southern Moldings* was whether to direct a decertification election where the petition was filed shortly after the successor commenced operations and recognized the incumbent union. The Board directed an election. It rejected the incumbent's contention that the petition was barred "under the *Keller Plastics* rule"—i.e., the rule that voluntary recognition insulates the union's majority status from challenge for a reasonable period of time.[5] "That rule," the Board said, "relates to the initial organization of an employer's employees and does not apply where . . . [a] successor-employer has continued to accept an incumbent union as the representative of its employees." Id. at 120. The Board explained that a successor "in effect stands in the shoes of the predecessor vis-à-vis the [u]nion." Thus, if the incumbent union's certification year has expired, the union enjoys "a rebuttable presumption of continuing majority status." "Clearly," the Board said, "in a successor situation, the union is not entitled to greater rights with respect to a successor than it had with a predecessor." Id. at 119.

Six years later, the Board did an abrupt about-face in *Landmark International Trucks, Inc.*, 257 NLRB 1375 (1981). Without so much as mentioning *Southern Moldings*, let alone overruling it, the Board in *Landmark*—citing the very *Keller Plastics* decision that the *Southern Moldings* Board held inapplicable—concluded that a *Burns* successor must afford the incumbent union a reasonable period of time for bargaining prior to any withdrawal of recognition. "We can discern no principle," the Board declared, "that would support distinguishing a successor's bargaining obligation based on voluntary recognition of a majority union from any other employer's duty to bargain for a reasonable period." 257 NLRB at 1375 fn. 4.

On review, the Sixth Circuit had no difficulty discerning such a principle. Pointing out the obvious, the court observed that "[a]s a successor employer Landmark had a *duty* to recognize and bargain with [the incumbent union] . . . ." *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815, 818 (6th Cir. 1983) (emphasis added). In other words, a successor's so-called voluntary recognition of an incumbent union isn't voluntary at all, but mandatory. The court's cogent explanation why principles drawn from *Keller Plastics* do not apply in the successorship situation is worth quoting in full:

> There is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive. In the latter cases the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship. However, where the union has represented the employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union. While the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing. A successor's duty to continue recognition under such circumstances is no different from that of any other employer after the certification year expires. Recognition under these circumstances carries with it no irrebuttable presumption of continued majority status. When a successor employer recognizes a union which has been certified as the exclusive representative of employees of the predecessor employer for one year or more, there is a rebuttable presumption only that the union continues to have the support of a majority of the employees.

Id. at 818–819.

Recognizing the error committed in *Landmark*, the Board overruled that decision in *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985). Expressly adopting the Sixth Circuit's rationale, id. at 1532, the Board echoed the court's language, holding that "where . . . a successor employer recognizes a union which has been certified for a year or more, the union enjoys a rebuttable presumption of majority status only." Id. at 1531. Two years later, the Supreme Court endorsed this rule. See *Fall River Dyeing*, supra, 482 U.S. at 41 fn. 8 (citing *Harley-Davidson Transportation*).

Thus matters stood until 1999, when the Board decided *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). *St. Elizabeth Manor* returned to *Landmark*, but with a twist. In *Landmark*, the Board based the conclusiveness of the majority-status presumption on the successor's "voluntary" recognition of the incumbent union. The Sixth Circuit dismantled that rationale, so the majority in *St. Elizabeth Manor* avoided directly equating recognition by a successor with voluntary initial recognition. Instead, it reasoned that initial recognition and successorship were sufficiently similar to warrant treating them the same. 329 NLRB at 343. The Board also invented a new name for the irrebuttable presumption it was imposing: "successor bar." Id. at 344. Members Hurtgen and Brame dissented.

[5] See *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966).

Three years later, the Board overruled *St. Elizabeth Manor* and restored the rebuttable-presumption standard. See *MV Transportation*, 337 NLRB 770 (2002). The Board framed the issue in familiar terms: the need to strike a proper balance between "[t]he competing statutory policies [of] . . . protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other." Id. at 770. The Board concluded that the successor bar failed to strike the right balance because it "promotes the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative." Id. at 773. The Board rejected the notion that the "reasonable period" duration of the successor bar made the bar an acceptable restriction of employees' free-choice rights in the interest of promoting bargaining stability. In this regard, the Board pointed out that the successor bar can be followed, without an intervening gap, by a 3-year contract bar, and that employees can actually find themselves barred from exercising their Section 7 free-choice rights for as many as 6 years: three while employed by the predecessor under a bar-worthy contract, and three more under a contract between the successor and incumbent union. Id. On the other side of the balance, the Board explained that the rule of *Southern Moldings* sufficiently "promotes the objective of maintaining stability in bargaining relationships" because the successor's duty to recognize and bargain with the incumbent continues indefinitely unless and until the unit employees withdraw their support from the union. Id. at 773–774. The Board rejected the premise of *St. Elizabeth Manor* that successorship resembles voluntary recognition and therefore warrants the same irrebuttable presumption of majority status, relying on the Sixth Circuit's observation in *Landmark* that "'the relationship between employees and union is one of long standing'" in the successorship situation, unlike voluntary recognition. Id. at 774 (quoting *Landmark*, 699 F.2d at 818).

Responding to Member Liebman's dissent, the *MV Transportation* Board rejected the argument that an irrebuttable presumption of majority status promotes labor-relations stability. To the contrary, if the incumbent union has lost majority support, barring employees from acting on their disaffection does just the opposite: it promotes instability. Id. The Board also criticized the successor bar as an "unwarranted extension" of *Burns* and *Fall River Dyeing* in light of the Supreme Court's recognition in *Fall River* of the successor's right to withdraw recognition at any time if the union loses majority support. Id. at 775. Finally, the Board concisely explained why successorship differs from other situations where Board law imposes a conclusive presumption of majority status for a period of time. Id.

Thus restored, the rebuttable presumption standard remained Board law until 2011, when the Board once again reimposed the successor bar in *UGL-UNICCO*, supra. Endeavoring to portray its decision as other than nakedly partisan, the *UGL-UNICCO* majority justified overruling *MV Transportation* on macroeconomic grounds: mergers and acquisitions—and with them, successorship events—had increased markedly since *Southern Moldings*, making a conclusive presumption of majority status necessary to ensure labor-relations stability. 357 NLRB at 805–806. Reprising *St. Elizabeth Manor*, the *UGL-UNICCO* majority declared successorship and initial recognition sufficiently similar to warrant the same treatment, relying on the rationale that in each, the bargaining relationship between union and employer is new and needs a reasonable chance to succeed. Id. at 806–807.

In addition to reinstating the successor bar, the *UGL-UNICCO* majority also modified Board law in two respects.

First, it addressed the duration of the "reasonable" successor-bar period, imposing different lengths depending on whether the successor exercises its right under *Burns* to set initial terms and conditions of employment. If it does not—if it continues the predecessor's terms and conditions without change—the bar period is 6 months. If it does set initial terms that differ from the predecessor's, the successor bar continues for no less than 6 months and no more than a year, with the duration determined in specific cases by applying the multi-factor test set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).[6] In either case, the successor-bar period runs from the date of the parties' first bargaining session. *UGL-UNICCO*, 357 NLRB at 808-809.

Second, the *UGL-UNICCO* majority modified contract-bar law in one respect. As noted above, the Board in *MV Transportation* pointed out that a successor bar, in combination with preceding and succeeding contract bars, could

[6] *Lee Lumber* involved an employer that had unlawfully refused to bargain, resulting in the imposition of an affirmative bargaining order. Under longstanding precedent, such an order grants the union a conclusive presumption of majority status for a reasonable period of time. In *Lee Lumber*, the Board held that this reasonable period continues for no less than 6 months and no more than a year, with the duration in a given case determined by application of five factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. 334 NLRB at 402.

deprive employees of their ability to exercise their Section 7 rights of free choice for as much as 6 years. In *UGL-UNICCO*, the majority responded that if this situation came to pass, "the contract-bar period applicable to election petitions filed by employees or by rival unions will be a maximum of 2 years, instead of 3." Id. at 810.

Member Hayes dissented, principally arguing that the successor bar "cannot be reconciled" with *Burns* and *Fall River Dyeing*. Id. at 811 (dissenting opinion). In addition, he rejected the notion that barring employees from exercising their free-choice rights is necessary to ensure labor-relations stability. "[A]n election does nothing to disturb stability," he pointed out, "since it merely either affirms the majority upon which stability must be based, or reveals that there is no real relationship to be stabilized or maintained." Id. at 812–813 (dissenting opinion).

II. DISCUSSION

The term *successor bar* is clever, but misleading. It is clever because it creates the impression that the bar doctrine of *UGL-UNICCO*, and of *St. Elizabeth Manor* before it, deserves to be grouped with bar doctrines that have been in place for 50, 60, 70 years and more. In 1951, the Board referred to the rule that a bargaining order insulates the union's majority status for a reasonable period of time as already "well settled."[7] The Supreme Court upheld the Board's certification-year bar in 1954.[8] In 1958, the Board referred to its contract-bar doctrine as more than 20 years old.[9] It created the recognition bar in 1966.[10] These longstanding bar doctrines have acquired the venerability of age. But the term *successor bar* is misleading because what it designates has little in common with the Board's longstanding bar doctrines. The term was invented by the *St. Elizabeth Manor* Board in 1999, for a rule that was injected into Board law (in *Landmark*) with no apparent awareness of contrary pre-existing precedent (*Southern Moldings*), was rejected by the Sixth Circuit, was repudiated by the Board soon thereafter (in *Harley-Davidson*), and prevailed as Board law, prior to 1999, for just 4 years, whereas the rebuttable-presumption-of-majority-status standard in successorship situations was in place for 23 years, from 1972 to 1981 and 1985 to 1999.[11]

Several reasons support overruling *UGL-UNICCO*. It fails to strike a proper balance between labor-relations stability and employee free choice—among other reasons, by permitting employees to be barred from exercising their Section 7 rights for more than 5 years. It is predicated in part on a false analogy between successorship and voluntary recognition—and even accepting the analogy arguendo, employees have greater scope to exercise free choice in the voluntary-recognition setting than under successorship law. It is also based on a macroeconomic rationale that does not stand up to scrutiny. Far from promoting labor-relations stability, as claimed by its proponents, it is a recipe for instability. Finally, Member Hayes was right: the successor bar cannot be reconciled with the rationale of the Supreme Court's decisions in *Burns* and *Fall River Dyeing*.

In contrast, restoring the rule of *Southern Moldings*, *Harley-Davidson*, and *MV Transportation* would realign Board law with Supreme Court precedent and strike a proper balance between labor-relations stability and the right of employees freely to choose whether to be represented by a labor organization and, if so, which one, which is guaranteed them by Section 7 of the Act. I would therefore overrule *UGL-UNICCO*, reinstate the rebuttable-presumption standard, and remand the 8(a)(5) withdrawal-of-recognition allegations (and others as described in footnote 4, above) for the judge to redecide them without the successor bar.

A. The Rebuttable-Presumption Standard Strikes the Proper Balance Between Bargaining Stability and Section 7 Rights.

Despite shifts in how best to achieve this, the Board has consistently recognized that its duty is to strike an appropriate balance between maintaining labor-relations stability and safeguarding employees' Section 7 rights to select, reject, or change bargaining representatives. See *UGL-UNICCO*, 357 NLRB at 804 ("Although the Board's decisions [regarding the successor bar] reached opposite conclusions, they agreed that the Board's proper task was to strike a balance between preserving employee freedom of choice and promoting stable collective-bargaining relationships."); *MV Transportation*, 337 NLRB at 772 ("It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice . . . and (2) the preservation of the stability of bargaining relationships."); *St. Elizabeth Manor*, 329 NLRB at 344 ("Employee freedom of choice is, of course, a bedrock principle of the statute. Equally so . . . are the goals of promoting sound and stable labor-management relations" (internal quotation omitted).).

---

[7] *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951).

[8] *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

[9] *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958).

[10] *Keller Plastics Eastern*, supra.

[11] I do not suggest—as my colleagues imply that I do—that the rebuttable-presumption standard is the superior rule *because* it has been the governing standard longer than has the so-called successor-bar standard. The rebuttable-presumption standard *is* the superior rule, for the reasons set forth below. Here, however, I simply point out that, prior to *UGL-UNICCO*, the view that a successorship event does not convert a rebuttable presumption into a conclusive one was the norm, and the contrary view—the one my colleagues embrace—a deviation from the norm.

The rebuttable-presumption standard strikes the appropriate balance. It supports labor-relations stability by entitling the incumbent union to a presumption of continuing majority status. That presumption, and the successor's corresponding duty to recognize and bargain with the incumbent, continues indefinitely unless and until the union loses majority support. And as the Board recognized long ago, "'[t]here is no reason to believe that the employees will change their attitudes merely because the identity of their employer has changed.'" *William J. Burns*, 182 NLRB 348, 349 (1970)[12] (quoting *NLRB v. Armato*, 199 F.2d 800, 803 (7th Cir. 1952) (alteration in *Burns*)). Instead of sheltering the union from the consequences of its own performance as bargaining representative, as the successor bar does, the rebuttable-presumption standard puts the union in charge of ensuring that it will have the same strong footing in bargaining with the successor as it had with the predecessor. Moreover, as Member Hayes pointed out, the fact that a rebuttable presumption means that employees can petition for a decertification election does not undermine the stability of the bargaining relationship between successor and union, since an election "either affirms the majority upon which stability must be based, or reveals that there is no real relationship to be stabilized or maintained." *UGL-UNICCO*, 357 NLRB at 812–813 (dissenting opinion).

Importantly, a rebuttable presumption of majority support provides this stability without curtailing employees' Section 7 right to petition for decertification or for representation by a different union, or to notify their employer that they no longer wish to be represented. See *MV Transportation*, 337 NLRB at 773 ("[T]he employees, who have firsthand knowledge of, and experience with, the union's ability, attentiveness and performance, properly can determine whether the incumbent union is adequately representing their interests . . . , or whether another representative or the employees themselves might be more effective in dealing with their prospective employer" (internal quotation omitted).). The rebuttable presumption standard thus strikes a true balance by providing labor-relations stability *and* protecting employee freedom of choice.

The successor bar, on the other hand, strikes no balance at all. Instead, it shelters incumbent unions from the consequences of their own performance at the complete cost of employee freedom of choice by imposing an *irrebuttable* presumption of majority status for either 6 months or no less than six and no more than 12 months, depending on whether the successor exercises its right under *Burns* to set initial employment terms unilaterally.[13] I agree with the observation of the Board in *MV Transportation* that proponents of the successor bar rely "on a paternalistic assumption that the employees in a successor employer situation need the protection of an insulated period . . . to make an informed decision regarding the effectiveness of their bargaining representative." 337 NLRB at 773 fn. 12; see also *St. Elizabeth Manor*, 329 NLRB at 349 ("The majority decision is best described by Judge Sentelle as the 'belief that those of the working class cannot be trusted to reject deceit on their own, and that, therefore, their benevolent big brother must watch after them.'") (Members Hurtgen and Brame, dissenting) (quoting *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 979 (D.C. Cir. 1998) (Sentelle, J., concurring)).

UGL-UNICCO reflects this paternalistic assumption. There, the Board opined that "[e]mployee support for the union may well fluctuate during the period following successorship, . . . and a successor bar may . . . prevent changes in employee sentiment being given effect through an employee petition to the employer or through a Board election." 357 NLRB at 807. In other words, the Board must protect employees from making a rash decision. But unless the incumbent union remains within its certification year (in which case the union retains a conclusive presumption of majority support after the transition to the successor), the employees have had ample time to make up their minds about the job their union has done, and no good reason exists to delay, potentially for years, the exercise of their right to decide that enough is enough.

The *UGL-UNICCO* majority argued that the suspension of employees' Section 7 rights is acceptable "so long as employees have a periodic opportunity to change or revisit their representation." 357 NLRB at 807. In practice, however, the successor bar does not guarantee that opportunity. The *UGL-UNICCO* Board made a show of concern over the scenario pointed out by the *MV Transportation* Board—i.e., the potential that employees could be barred from exercising their Section 7 free-choice rights for 6 years, three while contract-barred under a CBA between the predecessor and union, and three more where the successor and union reach a bar-worthy contract before the successor bar expires. 337 NLRB at 773. The *UGL-UNICCO* majority's solution? Where the right to an election would be barred for 6 years, the contract-bar period for the successor-union CBA would be 2 years instead of 3. 357 NLRB at 810. In other words, employees in a successorship situation can still be contract-barred for up

[12] Enfd. in part & enf. denied in part sub nom. *William J. Burns International Detective Agency, Inc. v. NLRB*, 441 F.2d 911 (2d Cir. 1971), affd. sub nom. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[13] Below, I explain why imposing a longer successor bar where the employer sets initial employment terms is contrary to the policy grounds upon which the Supreme Court relied in *Burns*.

to 5 years. And that is in addition to the successor-bar period itself, which can easily continue for more than a year—longer than the certification-year bar following a Board-conducted election[14]—if the successor exercises its *Burns* right to set initial employment terms, since the duration of the successor bar in that situation can last as long as 1 year, and the bar period does not start to run until the successor and incumbent union meet for their first bargaining session.[15] In other words, under *UGL-UNICCO*, despite the modification of contract-bar law, employees can still be denied the right to exercise free choice regarding representation for 6 years, or even longer. Better that the *UGL-UNICCO* Board had left the issue alone than to have engaged in this empty pantomime of solicitude for employees' Section 7 rights.

Additionally, the successor bar's duration of "a minimum of 6 months, but no more than one year" (where the successor exercises its right to set initial employment terms) does not enable employees to determine when they may file a petition with reasonable certainty that the filing will be timely—unless, of course, they wait a full year from the date of the first bargaining meeting (assuming they know that date), even though the reasonable period may have expired earlier than that—nor will they be able to ascertain when their employer will be permitted to withdraw recognition based on a showing of majority disaffection. Moreover, once the minimum 6 months have passed, the remaining duration of the successor-bar period is determined on a case-by-case basis by applying the five-factor test set forth in *Lee Lumber*, supra. Employees are unlikely to be familiar with this legal test, the application of which can be challenging even for experienced practitioners of traditional labor law, let alone to have access to the many facts required to apply it. The only way a would-be petitioner can know that his or her petition will not be rejected as untimely is to wait the full year from the parties' first bargaining session. As a practical matter, *that* is the duration of the bar period when the successor exercises its *Burns* right. See *UGL-UNICCO*, 357 NLRB at 813 (Member Hayes, dissenting) ("My colleagues make their purposes patently obvious by doubling the potential insulated period when a successor employer exercise[s] its *Burns* right to make changes.").

In sum, the successor bar imposes an unacceptable restriction on the right of employees to determine for themselves whether they wish to continue to be represented by a union they know perfectly well, and the bargaining-stability interests purportedly served by this restriction are well served by a rebuttable presumption of majority status. That presumption continues indefinitely unless employees withdraw their support, and if they do and their disaffection is untainted, the union has only itself to blame.

B. Successorship Is Not Similar to Initial Recognition and Does Not Warrant a Similar Insulated Period of Union Majority Status.

One of the bases upon which the Board relied in *St. Elizabeth Manor* and *UGL-UNICCO* was that the successorship situation is sufficiently similar to voluntary initial recognition to warrant granting the union a period of insulated majority status in the former as in the latter. See *UGL-UNICCO*, 357 NLRB at 807; *St. Elizabeth Manor*, 329 NLRB at 342–343. In *UGL-UNICCO*, for example, the majority reasoned that "[t]he new relationship will often begin in a context where everything that the union has accomplished in the course of the prior bargaining relationship (including, of course, a contract) is at risk, if not already eliminated. This is, emphatically, a new bargaining relationship that should be given a reasonable chance to succeed." 357 NLRB at 807. For several reasons, however, the claimed parallel between successorship and initial recognition does not survive scrutiny.

First and most importantly, voluntary recognition is just that, voluntary, whereas a *Burns* successor *must* recognize and bargain with the incumbent union. See *Landmark International Trucks*, 699 F.2d at 818 ("[Recognition cases] involve truly voluntary recognition during an organizing campaign, and have no application to cases where a successor employer is required by law to recognize a union with which its predecessor had a collective bargaining agreement."). Second, when an employer voluntarily recognizes a union, the unit employees need time to assess

[14] I agree with my predecessor at the Board that "[i]t is anomalous to impose a longer bar in successorship situations than would apply to cases involving a certified union following an NLRB-conducted election." *FJC Security Services, Inc.*, 360 NLRB 929, 930 (2014) (Member Miscimarra, concurring).

[15] Because "the running of the successor bar would commence on the date of the first bargaining session . . . the successor-bar period in many cases would last more than a year after the successor employer must recognize the incumbent union." *FJC Security Services*, 360 NLRB at 930 (Member Miscimarra, concurring). This is so because although the bar period does not start running until the parties' first bargaining meeting, "it appears that the Board would rely on the bar (and thereby decline to process rival union or decertification petitions) as soon as the successor became obligated to recognize and bargain with the union. In this respect, the successor bar under *UGL-UNICCO* would presumably bar representation petitions even before it started to run." Id. at 930 fn. 3.

My colleagues say that employers have it in their power to shorten the delay between the time the successor bar begins to apply and the time it starts to run by getting down to business and bargaining. That's true, *if* the union cooperates, but unions can delay bargaining, too. Indeed, an incumbent union that is losing or has lost majority status has every incentive to delay bargaining, since by doing so it can stretch the duration of the bar period and use the extra time to try to regain the unit's support. Whether this consideration played any role in the *UGL-UNICCO* majority's thinking when it crafted this aspect of the decision, there is no doubt unions can work it to their advantage.

the union's performance, whereas in a successorship scenario, employees have already had time to make an assessment.[16] Third, the recognition bar is based on a recent expression of union support by a majority of the unit employees, whereas the successor bar comes into existence based on nothing more than a transition from old employer to new, at a time when employees' most recent expression of union support may be years in the past. Fourth, the recognition bar is limited to a reasonable period after initial recognition, whereas the successor bar may be preceded by a contract bar created by the predecessor's CBA, resulting in a multi-year election bar.

There are also many practical differences between the circumstances faced by a newly recognized union and those in the successorship context. When a successor employer takes over a business with an incumbent union, "'[w]hile the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing.'" *MV Transportation*, 337 NLRB at 774 (quoting *Landmark*, 699 F.2d at 818). This key difference gives the incumbent union multiple advantages in bargaining that are not available to a new, voluntarily recognized union. The incumbent union has already had the opportunity to prove its value to the unit employees and establish a strong relationship with them to carry it through bargaining with the successor employer. Moreover, unlike a new union, which must develop working relationships with both the employer and the employees, the incumbent union has only to develop a relationship with the successor employer, which in turn has the burden of developing a relationship with the union *and* its new employees. Finally, unlike a new union, the incumbent union's "overall knowledge of the operations and the specific facility may exceed that of the new owners. Thus, it can build rapidly on its experience in handling workplace issues that particularly concern these unit employees." *St. Elizabeth Manor*, 329 NLRB at 349 (dissenting opinion). In light of these significant differences, there is simply no merit to the notion that a newly recognized union and an incumbent union in a successorship situation require the same protection from challenges to their majority status.

Moreover, even assuming the claimed analogy had some validity, employees have greater scope to exercise their Section 7 rights following a voluntary grant of recognition than they do under *UGL-UNICCO* in the successorship situation. In the former situation, the employer must post a notice informing employees that it has recognized a union as their bargaining representative, whereupon the employees have 45 days to petition for an election. Only if 45 days pass from the posting of the notice without a properly supported petition being filed does the recognition bar take effect. And the parties cannot circumvent this rule by signing a collective-bargaining agreement because that agreement does not have contract-bar effect *unless* the notice is posted and 45 days pass without a properly supported petition being filed. See 85 Fed. Reg. 18366, 18380–18388 (April 1, 2020; effective July 31, 2020); Section 103.21 of the Board's Rules and Regulations. I am confident that my colleagues in the majority, given sufficient time and opportunity, would change this state of affairs, but it is extant law, and it seriously undermines *UGL-UNICCO*'s rationale for the successor bar.

C. Macroeconomics Do Not Justify the Successor Bar.

The *UGL-UNICCO* Board defended its decision to reimpose the so-called successor bar partly on macroeconomic grounds. Asserting that "*MV Transportation* essentially sought to freeze the development of successorship doctrine as of 1975," the *UGL-UNICCO* majority claimed to take an "evolutional approach" that accounted for the fact that "the number and scale of corporate mergers and acquisitions has increased dramatically over the last 35 years," resulting in more successorship situations. 357 NLRB at 805. The majority argued that this increase in successorship, with its destabilizing effects, warranted reimposing the successor bar to enhance bargaining stability. Id. at 805-807. My colleagues double down on this rationale to justify adhering to *UGL-UNICCO*. For several reasons, I disagree with this rationale.

To begin with, broad trends in the overall economy do not change the fact that employees of each particular employer have Section 7 rights, and those trends do not "require, in any given successorship, that a particular unit of employees lose their right to choose to be represented or not." *MV Transportation*, 337 NLRB at 775. Moreover, even assuming the *UGL-UNICCO* majority and my colleagues are correct that more corporate mergers and

[16] This was the reason on which the Sixth Circuit chiefly relied when it rejected the Board's decision in *Landmark*, which squarely equated successorship with voluntary recognition:

> There is no reason to treat a change in ownership of the employer as the equivalent of a certification or voluntary recognition of a union following an organization drive. In the latter cases the employees must be given an opportunity to determine the effectiveness of the union's representation free of any attempts to decertify or otherwise change the relationship. However, where the union has represented employees for a year or more a change in ownership of the employer does not disturb the relationship between employees and the union. While the relationship between employees and employer is a new one, the relationship between employees and union is one of long standing. A successor's duty to continue recognition under such circumstances is no different from that of any other employer after the certification year expires.

Landmark International Trucks, 699 F.2d at 818–819.

acquisitions has meant more successorship events[17] and an overall increase in the economy-wide quantum of labor-relations instability, it does not follow—and neither the *UGL-UNICCO* majority nor my colleagues contend—that there is any more instability in any *particular* successorship situation than there was when *Southern Moldings* was decided in 1975. If the degree of instability in any given situation is unchanged, the macroeconomic rationale for reimposing (or adhering to) the successor bar evaporates into thin air. And there is no reason to believe that any particular successorship event is more destabilizing today than it was in the past, even if there are more of them.[18]

Moreover, *UGL-UNICCO* plainly had less to do with economic analysis than with the fact that successor employers are normally free to reject a collective-bargaining agreement negotiated by the predecessor, and the *UGL-UNICCO* Board's view that this is a flaw in successorship doctrine that needs to be mitigated. The *UGL-UNICCO* majority all but said as much:

> [Successorship] will often begin in a context where everything that the union has accomplished in the course of the prior bargaining relationship (including, of course, a contract) is at risk, if not already eliminated. . . . Because the destabilizing consequences of a successorship transaction for collective bargaining are themselves, in part, a function of successorship doctrine, it seems reasonable for the law to seek to mitigate those consequences, as a "successor bar" does.

357 NLRB at 807. I cannot agree with this reasoning, which amounts to an argument that Congress in enacting Section 8(d) of the Act, and the Supreme Court in deciding *Burns*, were just plain wrong. As the Supreme Court made clear in *Burns*, a successor employer's typical right to set initial employment terms arises from and is mandated by Congress's determination, expressed in Section 8(d), that the bargaining obligation established by the Act "does not compel either party to agree to a proposal or require the making of a concession":

> This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will. . . . "[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."

Burns, 406 U.S. at 287 (quoting *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)). The successor's right to set initial employment terms reflects national labor policy established by Congress; it is not, as the *UGL-UNICCO* majority would have it, a mistake requiring a corrective bar on the exercise of Section 7 rights.[19]

Finally, I reject the unstated but obvious premise implicit in *UGL-UNICCO*'s macroeconomic rationale that the successor bar is necessary because more corporate transactions means more successorship events means more labor-relations instability. The overt premise of this rationale is that restricting employee free choice stabilizes labor relations—and the implicit premise is the converse: allowing employee free choice *destabilizes* labor relations. When it comes to successorship, I disagree. Where employees already have ample experience upon which to form a judgment of a union's performance, *failing* to leave employees free to make a different choice contributes to instability. Where "a large percentage (or majority) of the employees support a petition to decertify or change the bargaining representative, the situation has reached maximum instability, and to fail to resolve the issue with a

[17] The degree to which the increase in mergers has translated into an increase in successorship events is not as straightforward as proponents of the successor bar have suggested. For example, the dramatic increase in the number of mergers in the late 1990s, noted by Member Liebman in her dissent in *MV Transportation* and echoed by the majority, was driven in large part by mergers in the largely unrepresented technology industry. See Paul A. Pautler, *Evidence on Mergers and Acquisitions*, Federal Trade Commission Bureau of Economics Working Paper 243, at 62 (Sept. 25, 2001) (available at https://www.ftc.gov/reports/evidence-mergers-acquisitions) (computer software, supplies and services industry accounted for 26.5% of mergers in 2000); see also Ian Kullgren, *Glitch's First-Ever Union Contract Marks Tech Industry Milestone*, Bloomberg Daily Labor Report (March 2, 2021) (noting that recently announced agreement was "believed to be the first-ever collective bargaining agreement at a U.S. software company"). Likewise, the source cited by the majority for its assertion that the value of mergers in the United States in 2021 was $2.6 trillion notes that mergers in the technology industry—again, largely unorganized—continue to drive the increase in mergers worldwide. See Matthew Toole, *Dealmakers Ring Out 2021 as the Year of M&A*, Refinitiv (Jan. 12, 2022), https://www.refinitiv.com/perspectives/market-insights/dealmakers-ring-out-2021-as-the-year-of-ma/.

[18] That the First Circuit accepted the *UGL-UNICCO* Board's macroeconomic rationale does not change the fact that an increase in successorship events economy-wide does not increase the labor-relations instability incident to any particular successorship event, nor did the court contend otherwise. Rather, it endorsed the macroeconomic rationale on the ground that a greater economy-wide quantum of labor-relations instability "portend[s] a heavier burden on the administrative law machinery, including the Board itself, in administering the National Labor Relations Act." *NLRB v. Lily Transportation Corp.*, 853 F.3d 31, 37 (1st Cir. 2017). My colleagues embrace this rationale. With all due respect to the court of appeals and the majority, I cannot agree that employees' free-choice rights under Sec. 7 of the Act should be subordinated to the Board's interest in not having to do more work.

[19] Indeed, Sec. 8(d) was added to the Act by Congress as itself a corrective, after Congress determined that the Board had transgressed the policy of free collective bargaining established by the Act at its inception. See *Burns*, 406 U.S. at 282–283. Proponents of the successor bar should take heed of what comes of such transgressions.

Board-conducted election simply aggravates the instability further. Instability is, in fact, preserved and increased rather than relieved" by imposing a successor bar. *MV Transportation*, 337 NLRB at 774.[20] In short, the successor bar is not the stabilizing remedy for the destabilizing modern economy that the *UGL-UNICCO* majority claimed it is.

D. UGL-UNICCO Cannot Be Reconciled with Supreme Court Precedent.

Member Hayes was right: the successor-bar doctrine is contrary to the Supreme Court's rationale in *Burns* and *Fall River Dyeing*.[21] Particularly in combination with the reasons set forth above, this reason should be enough to convince reasonable minds that the Board should overrule *UGL-UNICCO*, return to *MV Transportation*, and hold that an incumbent union in a successorship situation is entitled to, and only to, a rebuttable presumption of continuing majority status.

In *Burns*, the Court held that where a successor employer continues its predecessor's operation substantially unchanged and hires, as a majority of its workforce, the predecessor's union-represented employees, it must recognize and bargain with the incumbent union. 406 U.S. at 277–281. But the Court rejected the Board's position that where the predecessor and union had in place a collective-bargaining agreement, the successor becomes bound to the contract. Among its reasons for doing so was that the successor would "be bound to observe the contract despite good-faith doubts about the union's majority during the time that the contract is a bar to another representation election." Id. at 290. In other words, the *Burns* Court believed that avoiding a contract bar and allowing the incumbent union's majority status to be subject to challenge at any time *favored* its holding. It was a good thing. The *UGL-UNICCO* majority viewed it as a bad thing that had to be "mitigated" by barring elections anyway, even without a contract bar. I agree with Member Hayes' conclusion that in *UGL-UNICCO*, the majority meant "to strike a blow against *Burns*, protecting labor unions, not labor relations stability or employee free choice, by substituting an irrebuttable successor bar for the protections that the Supreme Court [had] denied them." 357 NLRB at 813 (dissenting opinion).

UGL-UNICCO is at cross-purposes with *Burns* in yet another respect. As noted above, in *UGL-UNICCO* the Board established different durations for the successor-bar period, depending on whether the successor exercises its right under *Burns* to set initial terms and conditions that differ from its predecessor's. If the successor does not exercise that right, the successor-bar period is fixed at 6 months from the date the successor and incumbent union first meet for bargaining. If the successor does exercise that right, the duration of the bar period is variable and uncertain, depends on multiple factors, and may last as long as 1 year, again from the date of the parties' first bargaining meeting. 357 NLRB at 808–809.

This framework is at odds with the policy grounds the Court cited in holding that a successor is typically free to set initial employment terms unilaterally. While the Court principally relied on Section 8(d) of the Act, relevant legislative history, and *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), it also observed that "saddling" the successor with the predecessor's employment terms may "inhibit the transfer of capital" and set the stage for labor strife:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the

[20] Member Hayes expressed a similar view in his *UGL-UNICCO* dissent, stating that "it is axiomatic that there cannot be a stable relationship where the incumbent no longer represents a majority of the employees in the unit. Thus, an election does nothing to disturb stability since it merely either affirms the majority upon which stability must be based, or reveals that there is no real relationship to be stabilized or maintained." 357 NLRB at 812–813 (dissenting opinion).

The majority says this argument proves too much—that taken to its logical conclusion, it undermines bar doctrines generally, not just the successor bar. But that would be to take the argument to an illogical conclusion. Unlike employees subject to the certification-year or recognition bar, employees in the midst of a successorship event have a history with the incumbent union and a basis upon which to assess its worth. They don't need 6 or 12 months to make up their minds. And unlike employees subject to the bar period following the issuance of an affirmative bargaining order, employees in the midst of a lawful transition from predecessor to successor have not had their faith in collective bargaining damaged by unlawful employer conduct, warranting a period of insulated majority status during which that faith can be restored. Accordingly, when it comes to successorship, I agree with Member Hayes and the *MV Transportation* Board that allowing employees to exercise free choice does not destabilize labor relations.

[21] See *UGL-UNICCO*, 357 NLRB at 811 (Member Hayes, dissenting).

> concessions that must be honored do not correspond to the relative economic strength of the parties.

406 U.S. at 287–288. In other words, the *Burns* Court rejected the view that the successor should be bound to the terms of its predecessor's collective-bargaining agreement as contrary to both sound economic policy and labor peace. *UGL-UNICCO* creates incentives that operate at cross-purposes with the Court's policy rationale. Under the *UGL-UNICCO* framework, the successor knows that if it adopts the predecessor's employment terms, its unit employees can act on any disaffection with the incumbent union in 6 months. And because the 6-month bar period would be fixed, it also knows that a would-be petitioner will know when to file the petition. On the other hand, the successor also knows that if it sets different initial employment terms, a would-be petitioner may have to wait as long as 1 year to file—and because the duration of the bar period would be uncertain and its determination subject to a complex multi-factor analysis, the would-be petitioner probably *should* wait the whole year. The incentive structure set up in *UGL-UNICCO* is plain, and it goes against the grain of the Court's policy rationale.[22]

The conflict between the successor bar and Supreme Court precedent is even more apparent in *Fall River Dyeing* than in *Burns*. In *Burns*, the union was still within its certification year when the successor took over, whereas in *Fall River* the predecessor and incumbent union had a longstanding bargaining relationship. Thus, the Court in *Fall River* had to decide whether *Burns* was limited to the scenario presented in that case or whether it also applies where the union's certification year has expired, and therefore its presumption of majority status is rebuttable. The Court concluded that *Burns* does apply in the latter situation. "We now hold," the Court wrote, "that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. *Where . . . the union has a rebuttable presumption of majority status, this status continues despite the change in employers*." 482 U.S. at 41. The union's *rebuttable* presumption of majority status continues, held the Court; it is not converted, by virtue of successorship, into an irrebuttable presumption. Underlining the point, the Court added a footnote to explain the circumstances under which the successor may lawfully withdraw recognition:

> If, during negotiations, a successor questions a union's continuing majority status, the successor "may lawfully withdraw from negotiation *at any time following recognition* if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support." *Harley-Davidson Transp. Co.*, 273 N.L.R.B. 1531 (1985).

482 U.S. at 41 fn. 8 (emphasis added).[23] As we have seen, *Harley-Davidson* was squarely based on the Sixth Circuit's repudiation of the Board's first ill-advised attempt, in *Landmark International Trucks*, to create a conclusive presumption of majority status in successorship situations.

The *UGL-UNICCO* majority termed footnote 8 in *Fall River* "merely a description of the legal landscape at the time."[24] But this ignores the reality that the Court's substantive rationale in *Fall River* is contrary to the very premise upon which the successor bar is largely based—namely, that preserving bargaining stability amidst the stresses of a successorship transition warrants according the incumbent union a conclusive presumption of majority status.

The Court in *Fall River* fully acknowledged what the Board in *UGL-UNICCO* emphasized above all else: the destabilizing forces at work when a new employer succeeds its predecessor. Such forces, the Court observed, affect both the incumbent union and the employees it represents. "During a transition between employers," said the Court, "a union is in a peculiarly vulnerable position," among other reasons because "[i]t has no formal and established bargaining relationship with the new employer . . . ." 482 U.S. at 39. As for employees, the Court observed that

> [i]f the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel

[22] See also *FJC Security Services*, 360 NLRB at 931 (Member Miscimarra, concurring) (stating that by imposing "a longer insulated period of bargaining on employers that set initial terms and conditions of employment," *UGL-UNICCO* "undermines their right to do so" and "undercuts a fundamental holding of the Supreme Court's decision in *Burns*").

[23] The Board's reference in *Harley-Davidson Transportation* to lawful withdrawal of recognition based on good-faith doubt of the union's continuing majority status reflected the then-extant standard under *Celanese Corp. of America*, 95 NLRB 664 (1951). *Celanese* was overruled by the Board in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), which held that an employer may withdraw recognition based solely on the union's actual loss of majority status.

[24] The majority notes that the First Circuit agreed with this characterization, but the First Circuit was rejecting a poorly developed argument that isolated passages appearing in *Burns* and *Fall River*, by themselves, require a rebuttable presumption rather than a bar. See *NLRB v. Lily Transportation Corp.*, 853 F.3d at 38–39 ("Lily contends that the bar is inconsistent with references to a presumption rule in *Fall River* and [*Burns*]. But the language in those cases on which Lily relies simply describes the legal landscape at the time."); see also Respondent-Appellee's Brief, 2016 WL 4151330 at *20–25. The employer in *NLRB v. Lily Transportation* did not argue, and the First Circuit therefore did not address, whether the successor bar is inconsistent with other aspects of *Burns* and *Fall River*. As I explain herein, it plainly is.

> that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it.

Id. at 39–40. The *UGL-UNICCO* majority quoted this language from *Fall River Dyeing*. See 357 NLRB at 803. Indeed, they put part of it in italics. But they missed—or chose to ignore—the Court's whole point.

Before embarking on its discussion of the stress that successorship places on unions and employees, the *Fall River* Court first reviewed "two presumptions regarding a union's majority status following certification. First, after a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for 1 year following the certification. . . . Second, after this period, the union is entitled to a rebuttable presumption of majority support." Id. at 37–38 (citations omitted). "These presumptions," the Court continued,

> are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision. The overriding policy of the NLRA is industrial peace. The presumptions of majority support further this policy by promoting stability in collective-bargaining relationships, without impairing the free choice of employees.

Id. at 38 (citations, internal quotation marks, and alterations omitted). The *presumptions*—both of them—promote stability in bargaining relationships and further the policy of industrial peace. And in the passage that follows, the Court consistently refers to "these presumptions," plural, as providing needed stability during the destabilizing successorship transition. "[D]uring this unsettling transition period, the union needs the *presumptions* of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." Id. at 39 (emphasis added). "The position of the employees also supports the application of the *presumptions* in the successorship situation." Id. (emphasis added). "Without the *presumptions* of majority support . . . , an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence." Id. at 40 (emphasis added).

The Supreme Court's meaning could not be clearer. If a successorship transition occurs when the incumbent union's certification year has not yet expired, the union carries the conclusive presumption of majority status conferred by the certification-year bar into the bargaining relationship with the successor, and that presumption fosters stability amidst the stresses of the transition. But if successorship occurs *after* the certification year has expired, the union carries a *rebuttable* presumption of majority status into the new bargaining relationship, and *that* presumption *also* promotes labor-relations stability "without impairing the free choice of employees." *Fall River*, 482 U.S. at 38 (internal quotation marks omitted). In other words, the rebuttable-presumption standard that the Board readopted in *Harley-Davidson* is not "merely a description of the legal landscape at the time" *Fall River* issued, as the *UGL-UNICCO* Board would have it. It is the standard, in the eyes of the Court, that appropriately safeguards both labor-relations stability and employee free choice once the certification year has expired. The holding of *UGL-UNICCO* cannot be reconciled with the Court's rationale in *Fall River*.

CONCLUSION

My colleagues adhere to *UGL-UNICCO* for two main reasons: because mergers and acquisitions have increased, and to promote collective bargaining. I have explained why the first reason deserves no weight, and why the First Circuit's acceptance of that rationale does not save it. That successorship events are more frequent now than in the past does not make any *particular* successorship event more destabilizing now than it used to be. And since successorship happens one transaction at a time, the greater frequency of such events does not justify placing a thumb on the "stability" side of the scale at the expense of employee free choice.

In support of their second reason, the majority cites Section 1 of the Act. Section 1 does indeed make "encouraging the practice and procedure of collective bargaining" the policy of the United States. But Section 1 equally makes it the policy of the United States to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives *of their own choosing*" (emphasis added). Thus, to be faithful to the Act it administers, the Board must promote *both* policies—not focus lopsidedly on the former policy as my colleagues have done.

For the reasons set forth above, I believe the rebuttable-presumption standard most recently adopted in *MV Transportation* better reflects the intent of Congress to promote both policies articulated in Section 1 of the Act than does the successor bar that *UGL-UNICCO* reinstated, and to which my colleagues adhere. It strikes an appropriate balance between bargaining stability and employees' Section 7 free-choice rights. It also aligns with the Supreme

Court's successorship decisions in *Burns* and *Fall River Dyeing*, as I have shown. Accordingly, I would overrule *UGL-UNICCO* and reinstate the rule that in a successorship situation, the incumbent union is entitled to, and only to, a rebuttable presumption of majority status. Applying that standard here, I would set aside the judge's determination that the Respondent's withdrawals of recognition were per se unlawful and remand the withdrawal-of-recognition allegations (as well as the post-withdrawal unilateral-change and failure-to-provide-information allegations) to the judge to determine whether the withdrawals of recognition were supported by untainted evidence showing that the Union no longer enjoyed majority support. Accordingly, from my colleagues' decision to affirm the judge's finding that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union in each of five bargaining units, I respectfully dissent.

Dated, Washington, D.C. June 28, 2022

_____

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from the Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union) or fail or refuse to bargain with the Union as the exclusive collective-bargaining representative of our bargaining-unit employees in the five bargaining units.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL on request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees in the following appropriate units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All medical technologists; excluding all other employees, executives, administrators, supervisors, head nurses, nurses in charge of training, and all other individuals with the authority to employ, discharge, promote, discipline or who in any way can change the status of an employee, or make recommendations, the infirmary director and the infirmary director's assistants.

All registered nurses; excluding all other employees, executives, administrators, supervisors, head nurses, nurses in charge of trainings, and all other individuals with the authority to employ, discharge, promote, discipline or who in any way can change the status of an employee, or make recommendations, the infirmary director and the infirmary director's assistants.

All practical nurses; excluding all other employees, executives, administrators, supervisors, head nurses, nurses in charge of trainings, and all other individuals with the authority to employ, discharge, promote, discipline or who in any way can change the status of an employee, or make recommendations, the infirmary director and the infirmary director's assistants.

All full-time Surgery Room Technicians, CT Technicians, Physical Therapy Technicians and X Ray Technicians employed by Respondent; excluding all other employees, Child and Adult Food Coordinators, X Ray Coordinators, Operation Room Coordinators, CT Coordinators, confidential employees, guards and supervisors as defined in the Act.

All full-time office clerks at our facility in Guayama, Puerto Rico; excluding all other employees, secretaries, guards, and supervisors, as defined in the Act.

WE WILL bargain for a minimum of 15 hours a week, and WE WILL submit written bargaining progress reports

every 30 days to the compliance officer of Region 12, and serve copies of those reports on the Union.

WE WILL, on request by the Union, rescind the following changes in the terms and conditions of employment for our unit employees that we made without affording the Union notice and an opportunity to bargain: changing the shifts of registered nurses; increasing the wages of technicians; granting employees a Hurricane Maria bonus or incentive; eliminating the requirement that employees pay a portion of their health insurance premiums; granting a uniforms bonus to registered nurses and practical nurses; and distributing and implementing an employee manual and general rules of conduct that made changes in unit employees' terms and conditions of employment.

WE WILL furnish to the Union in a timely manner the information requested by the Union on March 14, 2018, concerning a March 14, 2018 meeting we held with employees on health insurance benefits.

HOSPITAL MENONITA DE GUAYAMA, INC.

The Board's decision can be found at www.nlrb.gov/case/12-CA-214830 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Celeste M. Hilerio Echevarria and *Isis M. Ramos Melendez, Esqs.,* for the General Counsel.
Angel Munoz Noya and *Adrian Sanchez-Pagan, Esqs. (Sanchez Betances, Sifre & Munoz Noya),* for the Respondent.
Harry Hopkins, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter is before me on a consolidated complaint and notice of hearing (the complaint) issued on July 31, 2018, arising from unfair labor practice charges that Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union) filed against Hospital Menonita de Guayama, Inc. (the Respondent or the Hospital). The charges allege that the Respondent, an admitted successor employer, committed various violations of the Act relating to five separate bargaining units after it began operating the Hospital on September 13, 2017.[1]

Pursuant to notice, I conducted a trial in San Juan, Puerto Rico, on December 4, 6, and 7, 2018, and by telephone on March 14, 2019, at which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Did the Respondent, a successor employer to Hospital San Lucas Guayama (San Lucas), implement initial terms and conditions of employment that were different from those of San Lucas without giving the Union notice or an opportunity to bargain?

(2) Did the Respondent unlawfully withdraw recognition of the Union for the five separate bargaining units between February 5 and April 24, 2018?

(3) Did the Respondent, since on about February 7, 2018, fail and refuse to meet and bargain with the Union for all five units?

(4) Did the Respondent engage in the following conduct without giving the Union notice or an opportunity to bargain:

a. On about September 19 and until about October 21, and since on about June 17, 2018, changed the work schedules of RNs by assigning them 12-hour shifts?

b. On November 22, paid a bonus or incentive to employees in the five units who worked over night on September 19–20 during Hurricane Maria?

c. On February 11, 2018, granted a wage increase to technicians, after withdrawing recognition from the Union for that unit?

d. After withdrawing recognition from the Union, eliminated the requirement that employees in the five units pay a portion of their health insurance premium on dates from on about April 1 to June 1, 2018?

e. On May 18, 2018, granted a $200 uniforms bonus for the first time to RNs and LPNs?

f. In late June or early July 2018, distributed and put into effect an employee manual and general rules of conduct, applying to employees in all five units, which made changes in disciplinary rules and benefits?

(5) Since on about March 14, 2018, has the Respondent failed and refused to provide the Union with necessary and relevant information that it requested concerning a March 14, 2018 meeting with unit employees regarding changes in medical insurance?

Witnesses and Credibility

The sole witness was the Hospital's human resources (HR) director, Waleska Rodriguez (Rodriguez), whom the General Counsel called as an adverse witness under Section 611 (c) and the Respondent called in its case in chief.

The Respondent sought to present evidence in the way of witness testimony and documents (rejected R. Exhs. 1–11) concerning the Union's alleged loss of majority status. However, I disallowed such evidence based on my reading of the Board's

[1] All dates hereinafter occurred in 2017 unless otherwise indicated or clear from context.

governing precedent in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), which I will discuss in the analysis and conclusions section.

The parties stipulated to most salient facts, and Rodriguez' credibility is not determinative of the issues. I note that most of the exhibits were in the Spanish language; their English translations were later submitted with the designation of "(a)" after the respective exhibit number. Additionally, many of the pivotal events overlapped, and I generally will follow chronological order.

Facts

I find the following, based on the entire record, including testimony, documents, written and oral stipulations, and the thoughtful posttrial briefs that the General Counsel, the Respondent, and the Charging Party filed.

Events in 2017

San Lucas owned and operated the hospital prior to September 12, when the Respondent purchased its assets (see Jt. Exhs. 70 and 71). San Lucas had five units of employees represented by the Union, identified by letter designation for ease of reference:

(1) Medical Technologists (Unit A), since March 22, 2005 (see Jt. Exh. 2). The most recent collective-bargaining agreement was effective from September 1, 2008, until August 11, 2011 (Jt. Exh. 3).

(2) Registered Nurses (RNs) (Unit B), since August 25, 1998 (see Jt. Exh. 4). The most recent collective-bargaining agreement was effective from June 15, 2010, until June 16, 2013 (Jt. Exh. 5).

(3) Practical Nurses (LPNs) (Unit C), since August 25, 1998 (Jt. Exh. 6). The most recent collective-bargaining agreement was effective from June 15, 2010, until June 16, 2013 (Jt. Exh. 7).

(4) Technicians (Unit D), since April 12, 2012 (Jt. Exh.8). No collective-bargaining agreement was ever negotiated for this unit.

(5) Clerical Workers (clericals) (Unit E), since May 21, 2012 (Jt. Exh. 9). No collective-bargaining agreement was ever negotiated for this unit.

At the time that San Lucas sold its assets to the Respondent, San Lucas was in the process of bargaining successor collective-bargaining agreements for units A, B, and C; and initial contracts for units D and E. Negotiations for all five units were conducted at the same times.

The Respondent is solely owned by Menonite General Hospital, Inc. (Menonite Health System or MHS), its parent company. MHS, a nonprofit corporation based in Airbonito, Puerto Rico, operates the Respondent and several other healthcare facilities throughout Puerto Rico, including four other hospitals (see Jt. Exh. 75, an organizational chart).

The Respondent assumed operation of the hospital on September 13. It continued to operate the hospital in basically unchanged form and to employ a majority of San Lucas' employees. The parties stipulated that the Respondent became a successor employer to San Lucas. Rodriguez, who was HR director for San Lucas, continued as HR director for the Respondent and to perform the same functions. She reports to Rogelio Diaz (Diaz), the Hospital's administrator, who in turn reports to Pedro Melendez (Melendez), the executive director of MHS.

From September 8–12, the Respondent distributed identical letters offering employment to all of San Lucas' employees, including those in the above five units (Jt. Exh. 10 is a sample). The letter set out terms and conditions of employment, including different medical plan coverage, and gave the employees until September 12 to accept or reject the offer. All San Lucas employees accepted, no new hires were considered for employment, and the work force remained unchanged. The terms and conditions of employment described in the letter went into effect on September 13. Rodriguez testified that the process of verifying that all of the accepted offers were complete lasted into late September or October.

On September 8, Melendez informed the Union for the first time that all of the San Lucas employees represented by the Union had received an offer of employment to work for Respondent, subject to new terms and conditions of employment (Jt. Exh. 11). He advised the Union that in the event that a majority of San Lucas employees accepted, the Hospital would recognize the Union as the collective-bargaining representative of all units. Finally, he informed the Union, that the Respondent did not accept the terms and conditions established in the expired collective-bargaining agreements between the Union and San Lucas, or any agreements reached between the Union and San Lucas during bargaining for successor agreements. Rather, everything would be bargained anew.

On September 13, Union Representative Ariel Echevarria (Echevarria) requested that the Hospital recognize the Union as the representative of all units, and he further requested lists of employees by classification and the offer of employment that they had received (Jt. Exh. 12). On October 27, Union Representative Ingrid Vega (Vega) reiterated to Rodriguez the request for information (Jt. Exh. 16).

On September 18 and 19, Rodriguez, attempted unsuccessfully to respond to the Union by fax (Jt. Exh. 13). On October 4, the Respondent sent the letter to the Union by certified mail, and on October 13, delivered it to Ruth Perez, the Union's administrative assistant. Therein, Rodriguez advised Echeverria that prior to the hospital determining whether to recognize the Union, it needed to determine whether a majority of the unit employees had accepted its employment offer. She informed the Union that in the event the Union was recognized as bargaining representative, it would produce the requested information.

On September 19 and 20, Puerto Rico was struck by Hurricane Maria, a category 5 hurricane which had devastating effects to the island's power structure and telecommunications (stipulation at Jt. Exh. 1 at 8). The hospital remained operating through the emergency.

On about September 19, the Respondent temporarily assigned RNs in clinical areas of the hospital to work 12-hour schedules, instead of their regular schedule of 8-hour shifts, in reaction to a curfew established by the local government, among other reasons. This temporary schedule change lasted until on about October 21, after which the RNs reverted to 8-hour shifts.

Rodriguez testified that this was consistent with the Hospital's contingency plan, which was never bargained with the Union. The Union was never notified of the temporary 12-hour shifts or

the return to 8-hour shifts. Rodriguez testified that during Hurricane Irma, San Lucas temporarily instituted 12-hour shifts for RNs, pursuant to its contingency plan, but San Lucas did not so notify the Union.

Rodriguez, Vega, and two shop stewards met at the hospital on October 20. During the meeting, Rodriguez asked what the Union's position was regarding a proposed change in the work shifts of RNs from 8-hour to 12-hour shifts. Vega stated that the Union would agree to such change if done on a voluntary basis. The parties reached no agreements.

The Union filed a charge on October 26, alleging that "the employer failed and refused to bargain in good faith . . . ."(Jt. Exh. 15), which charge was later dismissed (Jt. Exh. 22). The record does not reveal the specific bases of the charge or the underlying facts that the Regional Director considered.

On October 27, Echevarria and Rodriguez met at the hospital. They discussed the Respondent's proposed implementation of 12-hour work shifts for RNs but were unable to reach an agreement. Echevarria requested that the Respondent reinstate the terms and conditions of employment of unit employees as they were under San Lucas. Rodriguez asked that he put this in writing.

On November 6, Rodriguez advised Echeverria that all of the employees who worked for San Lucas had accepted the Respondent's employment offer, and that the Respondent was recognizing the Union as the exclusive representative of employees in all units (Jt. Exh. 17). She replied to the Union's September 13 request for information (RFI) and attached a sample of the September 8 offers of employment (Jt. Exh. 18). Further, she referred to the October 27 meeting and her request that the Union submit a proposal.

On November 7, Rodriguez wrote to Echeverria, attaching additional information that Echeverria had requested on September 13 (Jt. Exhs. 19 and 20).

On November 22, the Hospital held Thanksgiving luncheons for the entire staff, in three shifts. At the luncheons, Diaz and Rodriguez distributed certificates and $150 checks to union, nonunion, and contracted employees who had worked overnight during Hurricane Maria, from the evening of September 19 into the morning of September 20 (see Jt. Exh. 21, payroll records; Jt. Exh. 73, a sample of the certificate). The certificates were signed by Melendez of MHS and Diaz; the checks were signed by Melendez and Jose Solivan, chief financial officer of MHS. Nonunion employees at all four other MHS hospitals who had worked overnight also received such payments. The parties stipulated that MHS paid the incentives. The Respondent did not notify the Union prior to the issuance of the checks or afford it an opportunity to bargain.

Events in 2018

On February 5, Diaz notified Echeverria that the Respondent was immediately withdrawing recognition of the Union as the bargaining representative of the technicians (Unit D) because the Hospital had "objective demonstrative evidence that a significant majority" of employees in that unit did not wish representation (Jt. Exh. 25).[2] At the time, 17 employees were in the unit (see Jt. Exh. 26).

On February 6, Echeverria requested from Diaz evidence that the Respondent had to support its allegation of loss support for the Union (Jt. Exh. 27). The same day, Diaz responded that the Hospital did not have to provide the Union with such information (Jt. Exh. 28).

On February 7, Echeverria requested that Rodriguez provide dates to meet and bargain over the collective-bargaining agreements for the units it represented (Jt. Exh. 29). She responded the same day (Jt. Exh. 30), asking that the Union submit its proposals for the four remaining units; once the Hospital received and analyzed the proposals, it would be available to coordinate the respective bargaining meetings. She did not offer any dates to meet.

On February 11, Respondent granted a salary adjustment to technicians, which had the effect of increasing their hourly rate (see Jt. Exh. 31, a chart prepared by Respondent that summarizes the salary adjustment per employee). The Respondent did not notify the Union of this salary increase or bargain with it over the change.

Along with a February 12 letter to Diaz, Echeverria submitted separate bargaining proposals for each of the five units (Jt. Exhs. 32–37).

On February 12, Echevarria advised Rodriguez that the Union had just learned of the Hurricane Maria bonuses and that the Respondent had not notified or bargained with the Union. (Jt. Exh. 38). He demanded to bargain thereover and requested certain information pertaining to its conferral. Finally, he referenced the bargaining proposals that he had sent earlier that day and requested that the Hospital provide dates to commence bargaining.

On March 7, Rodriguez responded (Jt. Exh. 51), explaining that the bonuses were in appreciation for the commitment to patients that the employees had demonstrated. She pointed out that the Hospital had provided other benefits to employees after the hurricanes. As to the information requests, she stated that the Respondent would provide work schedules, attendance records, and payroll records.

On February 14, Diaz informed Echevarria that the Respondent was withdrawing recognition from the Union as the collective-bargaining representative of the clerical workers (Unit E) (Jt. Exh. 40). Along with this letter, Diaz returned the Union's proposals for the technicians' and clerical workers' units. At the time, 42 employees were in the clerical workers' unit (see Jt. Exh. 41).

By separate letter of February 14 to Echevarria (Jt. Exh. 42), Diaz confirmed having received the Union's bargaining proposals and said that the Hospital would begin the revision and analysis process of the proposals for the LPN, RN, and medical technologist units. He stated that the Respondent would submit its counterproposals by the third week of April and that the parties would then begin the bargaining process. Echevarria responded to Rodriguez on February 19 (Jt. Exh. 48), contending

[2] Diaz used identical language in all four subsequent letters notifying the Union that the Respondent was withdrawing recognition for units A, B, C, and E.

that Diaz was requesting approximately 2 months before beginning negotiations and that this constituted an intention to stall the negotiations process. He requested that the Hospital provide as soon as possible available dates to begin bargaining.

On March 6, Diaz replied to the Union's February 19 letter (Jt. Exh. 49), asserting that any delays in negotiations was solely attributable to the Union. He pointed out that the Respondent had asked the Union to submit proposals as far back as October 27, 2017, but none had been submitted until February 12.

On February 14, Echevarria sent Rodriguez a summary of what they had discussed at the October 27, 2017 meeting (Jt. Exh. 44). On substantive matters, he stated that the Union had expressed no objection if the 12-hour work shifts were voluntary. Rodriguez responded the following day (Jt. Exh. 45), stating that the Union was told at that meeting that the 12-hour shifts for nurses could not be granted in a voluntary manner because it prevented preparation of the work schedule.

On March 7, Rodriguez responded to Echeverria's February 14 letter (Jt. Exh. 50), She disputed his account of the October 27 meeting, stating that that she had asked for proposals at that meeting, but the Union had not provided any until February. She also repeated what she and Echeverria had said about 12-hour shifts for RNs.

On February 16, Diaz notified Echevarria that the Respondent was withdrawing recognition of the Union as the representative of the medical technologists (Unit A) (Jt. Exh. 46). At the time, nine employees were in that unit (see Jt. Exh. 47).

On March 7, Echevarria wrote to Rodriguez, saying that the Union had just learned that unit employees would be receiving an orientation about the Menonita Health Plan on March 14 (Jt. Exh. 53). He stated that the Respondent had not notified or bargained with the Union, and he requested that they meet and bargain. Rodriguez responded that day (Jt. Exh. 53), contending that the Hospital had not made any changes to the medical insurance benefits provided to employees in the two units that the Union represented (RNs and LPNs).

On March 12, Echevarria sent Rodriguez a letter that covered a variety of topics (Jt. Exh. 54). Inter alia:

> (1) He disputed the Respondent's contention (in its March 6 and 7 letters) that the Union was responsible for the delay in negotiations. He further pointed out that the Hospital had been aware at all times that the Union's proposals mirrored the expired San Lucas collective-bargaining agreements. Finally, he further disagreed with the Respondent's stance that it wanted the Union's proposals and an opportunity to make counter-proposals prior to beginning negotiations.
>
> (2) He again contended that implementation of the new health plan and conferral of the bonuses were unlawful unilateral changes.

On March 14, the Echeverria wrote to Rodriguez regarding employees' medical insurance (Jt. Exh. 55). He stated that the Union had learned that Respondent had met with unit employees that same day to renew their health insurance coverage, and he requested: (a) copies of all documents signed by the employees at the meeting concerning employees' medical plan "renovation," including the document they signed to renew their medical insurance; and (b) copies of the attendance sheet for that meeting.

On March 19, Rodriguez responded (Jt. Exh. 56), reiterating the Respondent's earlier-stated position about the change. She attached: (a) copy of a sheet distributed to employees in the RN and LPN units, which summarized their health insurance benefits; and (b) a copy of the attendance sheet to the March 14, signed by employees in those units.

On March 19, by separate letter, Rodriguez replied to Echeverria's March 12 letter regarding the Hurricane Maria bonuses (Jt. Exh. 57). She stated that the Respondent had not recognized the collective-bargaining agreements between the Union and San Lucas and that the incentive payments were an expression of gratitude and not illegal.

On April 1, the Respondent reduced the cost of health care insurance for employees in the three units (technicians, clerical workers, and medical technologist) for which it had previously withdrawn recognition. Thus, before April 1, employees in those units had to cover 50 percent of their health care premiums; after April 1, the Respondent absorbed the totality of their health care premiums, effectively eliminating the 50 percent employee contribution. The Respondent did not notify or bargain with the Union over this change.

On April 4, Echeverria wrote to Rodriguez and renewed his request for copies of the document that workers signed concerning the change in medical plan (Jt. Exh. 58). The Respondent never replied.

On April 6, Diaz notified Echeverria that the Respondent was withdrawing recognition from the Union as the collective-bargaining representative of RNs (Unit C) (Jt. Exh. 59). Along with this letter, Diaz returned the Union's proposal for the RN unit. At the time, 109 employees were in the unit (see Jt. Exh. 60).

On April 18, Rodriguez sent Echeverria the Hospital's collective-bargaining proposal for employees in the LPN unit (Jt. Exh. 61).

On April 24, Diaz notified Echeverria that the Respondent was withdrawing recognition from the Union as the collective-bargaining representative of LPNs (Unit B) (Jt. Exh. 62). Diaz stated that the collective-bargaining counter proposal the Hospital had submitted on April 18 was therefore withdrawn. At the time, 16 employees were in the unit (see Jt. Exh. 63).

On May 1 and June 1, respectively, the Respondent reduced the cost of health care insurance for employees in the RN and LPN units, by eliminating their previous 50 percent health insurance premium contribution. The Respondent did not notify or bargain this change with the Union.

On May 18, the Respondent granted a bonus of $200 for uniforms to employees in the RN and LPN units (see Jt. Exh. 64). This was the first time that the Respondent granted such a bonus. The Respondent did not notify or bargain with the Union over the its payment.

Towards the beginning of June, the Hospital reexamined the subject of assigning employees in the RN unit to work 12-hour shifts, as opposed to the 8-hour work shifts they had been working since at least October 1, 2017. On about June 17, after soliciting input from RNs, the Respondent implemented 12-hour work schedules for RNs in a number of departments (see Jt. Exhs. 66 and 67). The Respondent did not notify or bargain this change with the Union.

Towards the end of June or the beginning of July, the Respondent distributed and implemented an employee handbook, employee manual, and general rules of conduct, applicable to all its employees (Jt. Exhs. 68 and 69). Before this, the Hospital had no employee manual or rules of conduct in effect. These promulgations made changes to disciplinary procedures and employee benefits.

Analysis and Conclusions

Setting Initial Terms and Conditions of Employment

A new employer is a successor to the old employer—and thus required to recognize and bargain with the incumbent labor union—when there is "substantial continuity between the two business operations and when a majority of the new company's employees had been employed by the predecessor. *UGL-UNICCO Service Co.*, 357 NLRB 801, 803 (2011), citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42–44, 46–47 (1987); see also *NLRB v. Burns International Security Services*, 406 U.S. 272, 281 (1972). The successor is not required to adopt the existing collective-bargaining agreement but may set initial terms and conditions of employment unilaterally, unless it is "perfectly clear that the new employer plans to retain all of the employees in the bargaining unit," *UGL-UNICCO* at 803, citing *NLRB v. Burns* at 294–295, in which event the successor employer should consult with the union before fixing such terms and conditions of employment. This depends on whether the successor employer has hired its full complement of employees and can determine that the union represents a majority of employees in the recognized unit. 406 U.S. at 295.

In *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board held that this "perfectly clear" exception to the general rule "should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing that they would be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." This is because of the possibility that many employees will reject employment under the new terms, potentially causing the Union to lose majority status in the new work force.

In subsequent cases, the Board clarified that the perfectly-clear exception applies when a new employer "displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor." *Creative Vision Resources, LLC,* 364 NLRB No. 91, slip op. at 3 (2016), citing *Canteen Co.*, 317 NLRB 1052, 1053–1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997) (new terms and conditions not announced until after the employer displayed an intent to employ the predecessor's employees). Put another way, to preserve its authority to unilaterally set initial terms and conditions of employment, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain its predecessor's employees. *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 6 (2016). See also *Walden Security, Inc.*, 366 NLRB No. 44 (2018).

Here, when the Respondent offered employment to San Lucas employees represented by the Union, it simultaneously set out the new benefits that it would be offering them. Therefore, employees were aware of those changes when they accepted the Respondent's offer of employment. Accordingly, I conclude that the Respondent did not violate the Act by setting initial and terms and conditions of employment for unit employees.

Withdrawal of Recognition

Most of the alleged violations hinge on the lawfulness of the Respondent's withdrawal of recognition from the Union for the five bargaining units.

In *UGL-UNICCO*, above at 808–809, the Board held that where the successor has not adopted the predecessor's collective-bargaining agreement, a union is entitled to a reasonable period of bargaining, during which an employer may not unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period (the "successor bar" doctrine).

In situations such as here, where the successor employer recognizes the union but unilaterally announces and establishes initial terms and condition of employment before proceeding to bargain, the "reasonable period of bargaining" is a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer. Id. at 809.

Not until November 6, 2017, did the Respondent notify the Union that the Respondent was recognizing it as the exclusive representative of employees in all five units. Thus, both Melendez' September 8 letter and Rodriguez' October 4 letter stated that the Hospital had to determine if the Union represented a majority of employees before it recognized the Union. Accordingly, the October 20 and 27 meetings, which primarily concerned the 12-hour shifts for RNs, cannot be considered negotiations for collective-bargaining agreements at a time when the Union was not yet recognized.

The Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the technicians (Unit D) on February 5, 2018, the clerical workers (Unit E) on February 14, and the medical technologists (Unit A) on February 16—prior to the time that the Respondent submitted any counterproposals to the Union's proposals of February 12. On April 6, the Respondent withdrew recognition of the Union for the RNs (Unit B) and returned the Union's proposal without making any counterproposal. Finally, the Respondent withdrew recognition for the LPNs (Unit C) on April 24, only 6 days after making its one and only counterproposal. The Respondent and the Union never had face-to-face negotiations.

Accordingly, I conclude that the Respondent's withdrawal of recognition of the Union for all five units ran afoul of the successor bar rule and that the Respondent unlawfully failed and refused to bargain with the Union thereafter. In light of this conclusion, I need not address the General Counsel's alternative argument that the withdrawals of recognition were unlawful because they occurred at times when significant unremedied unfair labor practices existed.

The Respondent, both at trial and in its brief, has argued that

the successor bar rule articulated in *UGL-UNICCO* should be overruled, but such a decision is outside of the scope of my authority and vests with the Board.

Failure to Meet and Bargain in Good Faith

The Union submitted its contract proposals on February 12, 2018. On February 14, the same day that the Respondent announced that it was withdrawing recognition of the Union for clerical unit, Diaz responded that the Respondent would submit counterproposals for the remaining four units by the last week in April. The Respondent never offered reasons why review of the Union's proposals would have taken over 2 months. By April 18, the Respondent had withdrawn recognition for the three other units, so that it recognized the Union only for the LPNs. On April 18, the Respondent made a counterproposal for the LPNs but only 6 days later withdrew recognition for that unit as well. As mentioned, the parties never had face-to-face negotiations.

The above circumstances, in conjunction with the Respondent's unlawful withdrawals of recognition, give rise to a strong suspicion that the Respondent had no intention of engaging in meaningful bargaining with the Union. I further note that two of the alleged unilateral changes occurred when the Respondent still recognized the Union for the units involved.

Unilateral Changes before Withdrawal of Recognition

A. 12-hour Shifts for RNs

The Respondent admittedly changed the work schedules of RNs from about September 19 until about October 21, 2017, from 8-hour to 12-hour shifts without affording the Union notice or an opportunity to bargain. At the time, the Respondent recognized the Union as the collective-bargaining representative of the RNs. Although Rodriguez testified that this was in accordance with the Respondent's contingency plan, she conceded that the Union was never notified of such plan or afforded an opportunity to bargain.

Prior to the trial, the complaint limited this allegation to the period since on about June 17, 2018; at trial, the General Counsel moved to amend the paragraph to add the 2017 dates. The Respondent opposed the amendment. Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See *Folsom Ready Mix, Inc.*, 338 NLRB 1172, 1172 fn. 1 (2003).

Section 10(b) of the Act requires that unfair labor practice charges be filed and served within 6 months of or after the allegedly unlawful conduct. However, a complaint may be amended to allege conduct occurring outside the 10(b) period if the conduct occurred within 6 months of a timely filed charge and is "closely related" to the allegations of the charge. *Fry's Food Stores*, 361 NLRB 1216, 1216 (2014), citing *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers whether (1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations. *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014).

Two of the charges were filed within 6 months of October 21, 2017, and alleged unilateral changes: (1) the charge in Case 12–CA–215039 was filed on February 28, 2018, and included the allegation that the Respondent unilaterally issued the Hurricane Maria bonuses; and (2) the charge in Case 12–CA–217862, filed on April 4, 2018, included the allegation that the Respondent unilaterally changed employees' health care coverage and premiums.

However, the shift change at the time of Hurricane Maria was unrelated to either of those actions, and the Respondent at trial offered a defense that was different and distinct from its justifications for the bonuses and the changes in health care coverage and premiums. This was made clear in Rodriguez' testimony, as described in the facts section. Accordingly, I conclude that the shift change in September—October 2017 cannot form the basis for finding an unfair labor practice. Nevertheless, it may be used to as evidence shedding light "on the true character of matters occurring within the limitations period. . . ." *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960); *Grimmway Farms*, 314 NLRB 73, 74 (1994), enf. granted in part and denied in part 85 F.3d 637 (9th Cir. 1996).

I need not address the General Counsel's argument that the Respondent's delay in recognizing the Union—also not alleged in the complaint—should similarly be considered as reflecting on the Respondent's pattern of conduct.

B. Hurricane Maria Bonuses

Initially, I reject out of hand the Respondent's contention that conferral of the bonuses was not imputable to the Respondent because MHS, the Respondent's parent company, was the responsible party. Both the normal nature of a parent's corporation to its subsidiary, and the underlying facts, render such a bifurcation of responsibility untenable.

On November 22, when the Respondent issued $150 bonus or incentive checks to employees in the five units who had worked over night on September 19–20 during Hurricane Maria, the Respondent still recognized the Union as the collective-bargaining representative for all of the units. The Hospital did not notify the Union in advance or give it an opportunity to bargain.

Gifts or bonuses tied to the remuneration that employees receive for their work constitute compensation for services and are in reality wages falling within the Statute. *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713, 714 (2d Cir. 1952). Thus, unilateral implementation of a $100 bonus based on productivity was found unlawful in *SMI/Division of DCX-CHOL Enterprises, Inc.*, 365 NLRB No. 152 (2017). See also *Cypress Lawn Cemetery Assn.*, 300 NLRB 609 (1990) (unilaterally establishing individual performance bonus a violation).

Therefore, the Respondent violated Section 8(a)(5) and (1) by unilaterally giving unit employees the $150 bonuses.

Unilateral Changes after Withdrawal of Recognition

Because I have found that the Respondent unlawfully withdrew recognition, it thereafter committed further violations of Section 8(a)(5) and (1) by unilaterally:

(A) Reinstituting 12-hour shifts for RNs since on about June 17, 2018.
(B) Granting a wage increase to technicians on February 11, 2018.
(C) Eliminating the requirement that unit employees pay a portion of their health insurance premium on dates from April 1 to June 1, 2018.
(D) Granting a $200 uniforms bonus for the first time to RNs and LPNs on May 18, 2018.

The Respondent has contended that the uniforms bonus was granted pursuant to the past practice between the Union and San Lucas (Jt. Exh. 1 at 18) but offered no evidence to substantiate this assertion. The Respondent has further contended that the payment of the $200 uniforms bonus was a requirement of Article 7 of Puerto Rico Law 180 of 1998 (Jt. Exh. 65). However, in the absence of evidence that the uniform bonus was ever offered prior to May 18, 2018, the Respondent offered no explanation for the timing of the benefit when the law was enacted over 2 decades earlier.

(E) Instituting 12-hour shifts for RNs since on about June 17, 2018.
(F) Distributing and putting into effect, in late June or early July 2018, an employee manual and general rules of conduct, which made changes in disciplinary rules and benefits for employees in all five units.

Failure to Furnish Information

The complaint alleges that since on about March 14, 2018, the Respondent failed and refused to provide the Union with necessary and relevant information that it requested concerning the March 14, 2018 meeting with unit employees over changes in their medical insurance, specifically (1) copies of all documents signed by the employees during the meeting and (2) copies of the attendance sheet for that meeting. Although the Respondent did provide the latter, it never provided copies of documents signed by employees.

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). To trigger this obligation, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Requests for information concerning the terms and conditions of bargaining unit employees are presumptively relevant. *Postal Service*, 359 NLRB 56, 56 (2012); *LBT, Inc.*, 339 NLRB 504, 505 (2003); *Uniontown County Market*, 326 NLRB 1069, 1071 (1998). An employer must furnish presumptively relevant information on request unless it establishes legitimate affirmative defenses to production. *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995). Here, the Respondent never offered any reasons why the documents signed by employees could not have been or should not have been furnished.

I therefore conclude that the Respondent violated Section 8(a)(5) and (1) by not providing the Union with such documents.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Unlawfully withdrew recognition of the Union as the collective-bargaining representative of five separate units of employees.
(b) Failed and refused to meet and bargain in good faith with the Union on the terms of initial collective-bargaining agreements.
(c) Without affording the Union notice or an opportunity to bargain:
1. Changed the shifts of RNs.
2. Granted technicians a wage increase.
3. Awarded unit employees a Hurricane Maria bonus.
4. Eliminated the requirement that unit employees pay a portion of their health insurance premiums.
5. Granted RNs and LPNs a uniforms bonus.
6. Distributed and put into effect an employee manual and general rules of conduct, which made changes in unit employees' terms and conditions of employment.
(d) Failed and refused to provide the Union with documents it requested on March 14, 2018, that unit employees signed at a March 14, 2018, meeting on health insurance benefits, which information was relevant and necessary to the Union's performance of its duties as collective-bargaining representative.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel requests as part of the remedy that I order the Respondent to recognize and bargain with the Union for a reasonable period of bargaining of a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the parties, as per *UGL-UNICCO*, above. The General Counsel further requests special remedies: that I order the Respondent to (1) bargain for a minimum of 15 hours a week until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining; and (2) prepare a written bargaining progress reports every 15 days and submit them to the Regional Director and also serve copies of the reports on the Union to provide the Union with an opportunity to reply.

The Board has long held that, in appropriate circumstances, unusual or special remedies are required to rectify an employer's unfair labor practices. See, e.g., *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978); *Crystal Springs Shirt Corp.*, 229 NLRB 4, 4 fn. 1 (1977).

These may include the special remedies that the General Counsel has requested. See *Professional Transportation, Inc.*, 362 NLRB 534, 536 (2019) (Board imposed such remedies when the respondent had "engaged in a series of dilatory tactics in contravention of its duty to bargain in good faith"); see also *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2 (2011), enfd. 540 Fed.Appx. 484 (2013) (unpublished decision); *Gimrock Construction, Inc.*, 356 NLRB 529, 529 (2011), enf. denied in part 694 F.3d 1188 (11th Cir. 2012).

I conclude that such special remedies are appropriate here. The Respondent's unlawful withdrawal of recognition of the Union from all five units, its pattern of conduct that showed no serious interest in engaging in collective bargaining, and its imposition of unilateral changes when it still recognized the Union demonstrated a desire to shirk its obligations as a successor employer.

As to the submitting of progress reports to the Regional Director, I find that they should be submitted every 30 days rather than every 15 days. See *All Seasons Climate Control*, ibid; see also *Professional Transportation, Inc.*, ibid.

The General Counsel has not contended that any of the Respondent's unilateral changes had a negative financial impact on any unit employees and has not requested a make-whole remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Hospital Menonita de Guayama, Inc., Guayama, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition of Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union) as the exclusive collective-bargaining representative of employees in five separate units, in contravention of its obligations as a successor employer.

(b) Failing and refusing to meet and negotiate in good faith initial collective-bargaining agreements with the Union for those five units.

(c) Making changes in unit employees' terms and conditions of employment without affording the Union notice or an opportunity to bargain.

(d) Failing and refusing to provide the Union with information that it requests that is relevant and necessary for the Union's performance of its duties as collective-bargaining representative.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union for a reasonable period of bargaining of a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the Respondent and the Union, without challenge to the Union's representative status.

(b) Within 15 days of the Union's request, bargain with the Union at reasonable times in good faith until full agreement or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Unless the Union agrees otherwise, such bargaining sessions shall be held for a minimum of 15 hours a week, and Respondent shall submit written bargaining progress reports every 30 days to the compliance officer of Region 12, serving copies thereof on the Union.

(c) The Union's request, rescind any changes in unit employees' terms and conditions of employment that were made without affording the Union notice or an opportunity to bargain.

(d) Provide the Union with information that it requested concerning the March 14, 2018 meeting on health insurance benefits.

(e) Within 14 days after service by the Region, post at its facility in Guayama, Puerto Rico, copies of the attached notice marked "Appendix,"[4] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 22, 2017.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. May 30, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE recognize Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union) as the bargaining representative of our full-time clerical workers, medical technologists, practical nurses, registered nurses, and technicians.

WE WILL NOT withdraw recognition of the Union as the collective-bargaining representative of the above employees and refuse to bargain with it, on the basis of loss of majority status during a period when we cannot lawfully withdraw recognition.

WE WILL NOT fail and refuse to meet and negotiate in good faith initial collective-bargaining agreements with the Union for the above employees.

WE WILL NOT make changes to your benefits and working conditions without affording the Union notice and an opportunity to bargain over those changes.

WE WILL NOT fail and refuse to provide the Union with all of information it requests that is necessary and relevant for the performance of its duties as the bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL, within 15 days of the Union's request, bargain with the Union at reasonable times in good faith at least 15 hours a week, unless the Union agrees otherwise, until full agreement or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement.

WE WILL provide the Union with the information it has requested since on about March 14, 2018, for documents that employees signed at a March 4, 2018 meeting concerning health insurance benefits.

WE WILL, at the Union's request, rescind the following changes that we made without affording the Union notice and an opportunity to bargain: in the shifts of registered nurses; in the wages of technicians; granting employees a Hurricane Maria bonus or incentive; eliminating the requirement that employees pay a portion of their health insurance premiums; granting a uniforms bonus to registered nurses and practical nurses; and distributing and implementing an employee manual and general rules of conduct that made changes in employees' terms and conditions of employment.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/12-CA-214830 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.